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No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

FREDERICK C. LANGONE,
MADELINE G. SARNO, VICTOR GRILLO,
LOUIS FERRETTI, GAIL A. FASANO,
THE LANGONE FOR LIEUTENANT GOVERNOR
COMMITTEE, AND FRANCIS X. BELLOTTI,
APPELLANTS,

v.

MICHAEL J. CONNOLLY,
AS HE IS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
DEMOCRATIC STATE COMMITTEE,
SAMUEL ROTONDI, JOHN F. KERRY,
LOIS PINES, AND EVELYN MURPHY,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
COMMONWEALTH OF MASSACHUSETTS.

Jurisdictional Statement.

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No.

In the

Supreme Court of the United States

October Term, 1982

FREDERICK C. LANGONE, MADELINE G. SARNO, VICTOR GRILLO, LOUIS FERRETTI, GAIL A. FASANO, THE LANGONE FOR LIEUTENANT GOVERNOR COMMITTEE AND FRANCIS X. BELLOTTI, as he is Attorney General of the Commonwealth of Massachusetts,
Appellants

v.

MICHAEL J. CONNOLLY, as he is Secretary of the Commonwealth of Massachusetts, DEMOCRATIC STATE COMMITTEE, SAMUEL ROTONDI, JOHN F. KERRY, LOIS PINES, and EVELYN MURPHY,
Appellees

QUESTIONS PRESENTED

1. Whether by refusing to place the name of appellant Frederick C. Langone upon the September 14, 1982 Democratic Party primary election ballot for the office of Massachusetts Lieutenant

Governor, appellee Secretary of the Commonwealth Connolly deprived appellants and the voting populace of fundamental constitutional rights without due process of law?

2. Whether appellee Secretary of the Commonwealth Connolly gave appellant Langone the constitutionally required minimum fair notice of the Secretary's restriction of appellant Langone's access to the Democratic Party primary election ballot for the office of Massachusetts Lieutenant Governor?

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OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts has not yet been issued by the Court and is therefore not reported or reproduced herewith. The Supreme Judicial Court on November 9, 1982, ordered waived as to this case its own rule that opinions be issued within one hundred-twenty (120) days of oral argument in a case. Oral argument in this case was held on June 29, 1982.

Although no opinion has yet been issued by the Supreme Judicial Court of Massachusetts, the court did enter a decisional Order on July 6, 1982 and a Judgment was entered by the Supreme Judicial Court for Suffolk County in this case on July 7, 1982. The Order of the Supreme Judicial Court of Massachusetts

was accompanied by a rescript responding to the questions presented in the case. Both the Order and rescript are reproduced in the appendix to this statement. (App. A and B, respectively). The Reservation and Report of the Single Justice which framed the issues is reproduced in the appendix (App. C), as is the Judgment entered by the Single Justice following the Order of the Supreme Judicial Court. (App. D). Notices of appeal were timely filed on September 23, 1982, and are reproduced herewith. (App. E and F).

JURISDICTION OF THIS COURT

Because the opinion of the Supreme Judicial Court has not yet been issued, it is not possible for the appellants to precisely specify at this time what the jurisdictional basis for this appeal is. The opinion of the Court could rest on one of two possible bases in order to support the Court's rescript and judg-

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ment. The Supreme Judicial Court may uphold the constitutionality of the Massachusetts statutory scheme for obtaining access to state primary ballots in light of a challenge that the statutes are repugnant to the Constitution of the United States. In that event, the jurisdiction of this Court would be conferred by 28 U.S.C. §1257(2). Commonwealth Bank v. Griffith, 39 U.S. 55 (1840); First National Bank v. Bellotti, 435 U.S. 765 (1978).

Alternatively, the Supreme Judicial Court may hold that the Massachusetts statutory scheme fails to protect the political associational rights of the members of the state Democratic party and is therefore repugnant to the Constitution of the United States. In this event, the appellants respectfully re-

quest that this pleading be treated as a Petition for Writ of Certiorari. If the statutory scheme has been held to be unconstitutional, the jurisdiction of this Court would be conferred by 28 U.S.C. §1257(3). Minnesota v. Clover Leaf Creamery Company, 445 U.S. 949 (1980); New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution as well as the state statutory scheme by which candidates are nominated for state office at primary elections in Massachusetts. Massachusetts General Laws, Chapter 53, sections 1 et seq. The pertinent text of

these constitutional provisions and statutes is set forth in the appendix. (App. G).

STATEMENT OF THE CASE

The appellants commenced this action on June 2, 1982 in Suffolk County Superior Court by the filing of a complaint against Michael J. Connolly, Secretary of the Commonwealth of Massachusetts. The appellants alleged that the defendant Secretary Connolly's refusal to place the name of Frederick C. Langone, a candidate for the Democratic Party nomination for the office of Massachusetts Lieutenant Governor, upon the September 14, 1982, Democratic Party primary election ballot deprived appellants of their rights under the First and Fourteenth Amendments to the United States Constitution. The complaint requested an injunction enjoining the

Secretary and all others acting in concert with him from failing to place the name of Frederick C. Langone upon that ballot.

Upon motion of the defendant Secretary Connolly, the Democratic State Committee was added as a party defendant as were Evelyn Murphy, Samuel Rotondi, Louis R. Nickinello, John F. Kerry and Lois E. Pines, all of whom were, like appellant Langone, candidates for the Democratic nomination for the office of Lieutenant Governor. The Secretary had indicated that he would place the names of these persons upon the primary ballot. Mr. Nickinello subsequently withdrew from the case. Added as a party plaintiff, also upon motion of defendant Secretary Connolly, was Joel M. Pressman, a candidate for the Democratic nomination for the office of Lieutenant Governor who,

like plaintiff Langone, had been excluded by Mr. Connolly from the primary ballot.

On June 9, 1982, the Court allowed the motion of the Attorney General of the Commonwealth to intervene as a plaintiff. The Attorney General then filed a complaint seeking a declaration of the rights of the parties and an order of mandamus against the defendant Secretary Connolly ordering him to place the names of plaintiffs Langone and Pressman upon the primary ballot.

On June 11, 1982, the action was transferred to the Supreme Judicial Court for Suffolk County pursuant to M.G.L. c. 211, §4A. On June 18, 1982, upon motion of all parties, that Court reserved and reported to the full Supreme Judicial Court for the Commonwealth the following questions of law:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the "Charter of the Democratic Party of the Commonwealth"?

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the "Charter of the Democratic Party of the Commonwealth", but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

Briefs were filed by all interested parties. On June 29, 1982, oral argument was had before the full bench of the Supreme Judicial Court. On July 6, 1982,

the Supreme Judicial Court issued an order answering both of the reported questions "no". A copy of this order and the accompanying rescript are reproduced in the appendix. (App. A and B, respectively). On July 7, 1982, judgment upon the rescript was entered in the Supreme Judicial Court for Suffolk County. A copy of that judgment is reproduced in the appendix (App. C).

Separate notices of appeal were filed in a timely fashion by the appellants and by the appellant Attorney General. The notices of appeal are reproduced in the appendix. (App. E and F). Because the opinion or opinions of the Supreme Judicial Court had not been issued on September 27, 1982, Mr. Justice Brennan granted appellants a sixty day extension of time in which to docket their appeal or to petition for a writ of certiorari.

Appellant Frederick C. Langone was a candidate for the Democratic Party nomination for the office of Lieutenant Governor. Appellants Sarno, Grillo, Ferretti, and Fasano are registered voters eligible to vote in Democratic primary elections and supporters of Mr. Langone. Appellant Langone for Lieutenant Governor Committee is a political committee organized for the purpose of influencing the Democratic Party to nominate Frederick C. Langone for the Office of Lieutenant Governor and further to influence the general electorate to elect Mr. Langone to that office.

The Massachusetts Legislature has provided that political parties, including the Democratic Party, shall nominate candidates for statewide offices including that of Lieutenant Governor by direct plurality vote at a primary elec-

tion. M.G.L. c.53, §2. The Legislature has further prescribed four requirements that must be satisfied by a candidate for his name to be placed upon the primary ballot:

(1) the filing of nomination papers containing the certified signatures of at least 10,000 voters eligible to vote in the Democratic Party primary election, for the office of Lieutenant Governor; see M.G.L. c.53, §44;

(2) the filing of a written acceptance of the nomination, see M.G.L. c.53, §45;

(3) the filing of a certificate of enrollment in the party for ninety days prior to the last date for filing nomination papers, see M.G.L. c.53, §48; and

(4) the filing of a financial interest statement with the State Ethics Commission, see M.G.L. c.53, §9.

All parties, including the defendant Secretary Connolly, are agreed that

appellant Langone complied with the statutory requirements for placement of his name upon the primary ballot. In addition to meeting the other requirements he filed nomination papers with 13,064 signatures of registered voters. Notwithstanding this, defendant Secretary stated that he would not place appellant Langone's name upon the primary ballot because Langone had not complied with a provision of the Democratic Party Charter, Article Six, Section III, which has never been enacted as a General Law and which provides:

> There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by the majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on

any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

Article Six, Section III, was enacted by the Massachusetts Democratic Party in the following manner. In February, 1977, the Democratic State Committee appointed a Charter Commission to draft a proposed charter for the Democratic Party. A convention of the Democratic Party was held on May 19, 1979 for the purpose of acting upon the proposed charter for the party. That convention was adjourned prior to its consideration of proposed Article Six, Section III. The Charter Convention reconvened on November 17, 1979 and Article Six, Section III, was voted upon and adopted.

Subsequently the Democratic Party took several actions indicating that it never intended, nor did it believe, that

Article Six, Section III would take effect absent enabling legislation. On February 1, 1981, and on a subsequent occasion prior to April 1, 1981, the Democratic State Committee mailed to various party members a copy of the charter as adopted in 1979 and a letter from its chairman, Chester G. Atkins, which stated:

> Legislation must be passed in order to implement the following portions of the Charter...Article Six, Section III "Endorsing Convention" ---entire section... The legislation necessary to implement these points has been filed and will be considered during the 1981 session of the Massachusetts Legislature.

On July 27, 1981, the Democratic State Committee mailed to various party members a document entitled "The Charter and Platform of the Democratic Party of the Commonwealth of Massachusetts." This document contained on its Table of Con-

tents page the following heading: "CHARTER OF THE DEMOCRATIC PARTY OF THE COMMONWEALTH OF MASSACHUSETTS*". At the bottom of the page, the following appeared: "*NOTE: Several sections of the Charter have yet to go into effect due to legislation pending in the Massachusetts General Court." In fact, since Article Six, Section III, was adopted by the party, party members have made several attempts to have legislation passed that would put this provision into effect. None of these attempts has been successful.

On April 23, 1982, the Massachusetts Supreme Judicial Court issued its Opinion of the Justices, 385 Mass. 1201, 434 N.E. 2d 960 (1982). This opinion was in response to questions submitted by the Governor, pursuant to Part II, c. 1, §1 art. 2 of the Massachusetts Constitution,

concerning a bill passed by the legislature and awaiting the Governor's signature. The bill would have amended M.G.L. c. 53, §44 by providing that notwithstanding any charter, rule or by-law of a political party, any candidate submitting the number of certified signatures required by statute shall appear on the primary election ballot. The Justices specifically declined to determine whether the "15 percent rule" as contained in the Democratic Party Charter superceded existing statutes. Id. at 1202-1203, 961. The Justices did opine that the bill then before the Governor for signature which provided that a candidate would be placed upon the ballot upon meeting the signature requirements of the General Laws notwithstanding any political party rule to the contrary would be unconstitutional because it

would violate the First Amendment associational rights of the party. 385 Mass. at 1204-1208, 434 N.E. at 962-964.

Until the issuance of the April 23, 1982, Opinion of the Justices, appellant Langone had been given no notice by any state official that he was required to meet conditions beyond those prescribed in the statutes in order to have his name placed upon the September 14 primary ballot. In preparation for his attempt to secure the Democratic party nomination, Langone, on March 4, 1982, obtained from the office of the Secretary of the Commonwealth, the constitutional officer charged with overseeing elections in Massachusetts, see McCarthy v. Secretary of the Commonwealth, 371 Mass. 667 (1976), "state primary nomination papers", an accompanying instructional pamphlet, and a booklet entitled "Can-

didate's Guide 1982 State Elections", all of which were prepared by the Elections Division of the Office of the Massachusetts Secretary of State and were provided to candidates seeking nomination to statewide office by the Secretary of State's Elections Division. Each of these documents stated that a candidate would be placed upon the primary ballot if he met the requirements set forth by statute. If a candidate met these filing requirements, the Candidate's Guide declared:

> Primary nomination papers will place your name on the Democratic or Republican party state primary ballot.

The documents provided by the Secretary of State made no reference to any political party conventions or requirements for convention support.

The April 23 Opinion of the Justices was the first notice appellant Langone had that he may be required to comply with the 15 percent requirement of the Democratic Party charter in order to be placed upon the ballot. Even after this opinion was issued by the Court, defendant Secretary Connolly failed to state whether he would impose the charter rule. Upon issuance of this opinion, Langone took the steps necessary to have his name placed in nomination before the Democratic Party's Endorsing Convention. In doing so, however, he filed a statement with the Democratic State Committee indicating his position that the convention was non-binding and excepting to the 15% requirement.

On May 21 through May 22, 1982, a convention of the State Democratic Party was held for the purpose of endorsing

candidates for statewide office, including the office of Lieutenant Governor. Langone's name was placed in nomination at the convention and seconded; Langone failed, however, to receive 15 percent of the delegate vote on any ballot. Thereafter, on May 25, 1982, Chester G. Atkins, Chairman of the Democratic State Committee, wrote defendant Connolly informing him that five candidates for Lieutenant Governor had received 15 percent of the convention vote. Langone's name was not among those listed as eligible. Atkins enclosed with his letter a copy of the party's charter. This was the first time that the appellee Secretary, as Secretary of State, had ever been informed by any officer of the Democratic party of the provisions of the Democratic Party Charter.

On May 25, 1982, Secretary Connolly formally announced his decision that, based on Atkins' May 25 letter and the Democratic Party Charter, he would not place Langone's name upon the primary ballot notwithstanding his compliance with the statutory requirements.

THE QUESTIONS PRESENTED ARE NOVEL AND SUBSTANTIAL

1. The Supreme Judicial Court Has Ruled that the Massachusetts Democratic Party May Constitutionally Restrict Ballot Access in Massachusetts Primary Elections.

In deciding the case below, the Supreme Judicial Court has addressed and decided a significant question of federal constitutional law, i.e. whether a state officer and a political committee, appel-

lees Connolly and the Democratic State Committee, may properly exclude a candidate's name from a state primary election ballot on the basis of a rule adopted by a state political party convention. In deciding this question, the Supreme Judicial Court determined that such an exclusion is permissable. In Smith v. Allwright, 321 U.S. 649, 665-666, 64 S. Ct. 747, 765-766 (1944), this Court expressly ruled to the contrary.

In Allwright, the Court took note of its opinion in United States v. Classic, 313 U.S. 299, 316-317, 61 S.Ct. 1031, 1038 (1941), that primaries were an integral part of the election machinery, and concluded that the conduct of primary elections was properly a state rather than a political party function. The Allwright Court ruled that the state may not validly delegate the power to fix

qualifications for primary participation to political parties. The Court reasoned as follows:

> Classic bears upon Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622 (1935), not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualification of primary elections is delegation of a state function that may make the party's action the action of the state. When Grovey v. Townsend was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. (Emphasis added.) Allwright, supra, 321 U.S. at 660-661, 64 S.Ct. at 763.

It is thus a state function to conduct the primary and the state is therefore entitled to determine the qualifications of primary participants, voters and candidates alike, and the party's associational rights are not

thereby seriously threatened. Therefore neither the party nor the state may constitutionally employ the party's associational interest as a means of circumventing constitutional guarantees for the purpose of denying Langone and his supporters their right of ballot access. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809.(1953).

This conclusion has not been altered by this Court's decisions in two recent cases. In Democratic Party of the United States v. LaFollette, 450 U.S. 107, 101 S.Ct. 1010 (1981), the national Democratic Party challenged a Wisconsin statutory requirement that delegates to its presidential nominating convention vote for candidates on convention ballots in accordance with the results of Wisconsin's preconvention primary. The Court held that political parties may, by

the adoption of rules, protect themselves from state intrusion upon their internal decision making. 450 U.S. at 122-124, 101 S.Ct. at 1019. The Court also held that while the state has a compelling interest in the integrity of the primary process, it has no interest in the internal procedures of the party convention. 450 U.S. at 124-126, 101 S.Ct. at 1020. In this case we are concerned not with the internal decisions of the party but with the primary. The analysis by the LaFollette Court of the state's interest further differentiates LaFollette from the case here. This difference may be seen from the Court's reliance upon Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541 (1975).

In Cousins, the Court ruled that the state of Illinois' interest in protecting the integrity of its electoral process

was not compelling in the context of delegate selection to a national party convention. 419 U.S. at 489, 95 S.Ct. at 548. The Court stated that the states have no role in the selection of presidential candidates and that if the qualification and eligibility of delegates to national conventions were left to state law, the "intolerable" result would be a patchwork of qualifications established by each of the fifty states. 419 U.S. at 490, 95 S.Ct. at 549. A different situation altogether, however, is presented by state regulation of state primaries for state offices. This latter situation involves an entirely different set of factors than were involved in Cousins. 419 U.S. at 497, 95 S.Ct. at 552 (Powell, J. concurring).

This Court has gone beyond state elections and recognized that a state's

restrictions upon the method for the election and composition of a political party's executive committee does not violate the party's rights of association. Marchioro v. Chaney, 442 U.S. 191, 99 S.Ct. 2243 (1979). "(A)s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, (1974). Therefore, this Court's opinions indicate that while the party's associational interests protect it from state intrusion into its internal convention processes, these associational rights are not so compelling as to permit the party to intrude upon the state's domain by regulating state primary elections. Nonetheless, the Supreme Judicial

Court has apparently held that a political party is entitled to regulate state primary elections by establishing the qualifications for ballot position because of its associational interests.

2. The Appellee Secretary Connolly's Failure to Place Langone's Name Upon the Democratic Primary Ballot Was an Impermissible Restriction of the Constitutional Rights of the Appellants.

The First and Fourteenth Amendments to the United States Constitution protect appellant Langone's right to run for public office and his right of access to the ballot. Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315 (1974); Edwards v. Reynaud, 463 F. Supp. 1235 (E.D. La. 1979). Langone's candidacy for public office is a form of political expression within the protection of the First Amend-

ment to the United States Constitution. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 186, 99 S.Ct. 983, 991 (1979); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849 (1972). The right to run for office also affects the candidate's freedom to associate. Williams v. Rhodes, 393 U S. 23, 89 S.Ct. 5 (1968); Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). These First Amendment protections apply equally to a primary election since it is an integral component of the total electoral process. Lubin v. Panish, supra, 415 U.S. at 715, 94 S.Ct. at 1319; United States v. Classic, 313 U.S. 299, 318-319, 61 S.Ct. 1031, 1039 (1941).

3. The Action of the Appellee Secretary Connolly in Refusing Langone a Place on the Primary Ballot also Restricted the Rights of Expression and

Association of Langone's Supporters and Contributors and of the Voting Populace in General.

Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Illinois v. SWP, supra, 440 U.S. at 184, 99 S.Ct. at 990, quoting Williams v. Rhodes, supra, 393 U.S. at 30, 89 S.Ct. at 10. Access restrictions implicate the right to political expression because "the interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the

balance." Lubin v. Panish, supra, 440 U.S. at 716, 94 S.Ct. at 1320. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." Illinois v. SWP, supra, 440 U.S. at 184, 99 S.Ct. at 990.

The appellants' right of association and the associational rights of voters generally have also been damaged by Connolly's refusal to place Langone's name upon the primary ballot. The freedom to associate for the purpose of electing a particular candidate is a fundamental right which is sorely diminished if that candidate can be kept off the ballot. Illinois v. SWP, supra, 440 U.S. at 184, 99 S.Ct. at 990; Williams v. Rhodes, supra, 393 U.S. at 30-31, 89 S.Ct. at 10.

The Court stated in Lubin v. Panish, supra, 415 U.S. at 716, 94 S.Ct. at 1320, that exclusion of candidates from the ballot heavily burdens the right to vote. Langone's supporters' right to vote and the rights of potential Langone voters are of the most fundamental significance under our constitutional structure. Illinois v. SWP, supra, 440 U.S. at 184, 99 S.Ct. at 990, Cf. Rodriquez v. Popular Democratic Party, _____ U.S. _____, 102 S.Ct. 2194, 2199 (1982). Connolly's action thus constitutes a significant abridgment of fundamental constitutional freedoms.

4. Connolly's Refusal to Place Langone's Name Upon the Ballot Failed to Further a Compelling Interest of the State by the Least Drastic Available Means.

Massachusetts may not impose limitations on access to the ballot which constitute a denial of equal protection or due process of law. Bullock v. Carter, supra, 405 U.S. at 141, 92 S.Ct. at 854. For two reasons, the refusal by appellee Connolly to place Langone's name upon the ballot must be reviewed with strict scrutiny. First, Connolly's refusal clearly constitutes a substantial restriction upon the fundamental rights of Langone, his supporters, and the voting populace. Lubin v. Panish, supra, 415 U.S. at 716, 94 S.Ct. at 1320; American Party v. White, 415 U.S. 764, 780, 94 S.Ct. 1296, 1305-1306 (1974). Clements v. Fashing, _____ U.S. _____, 102 S.Ct. 2836, 2843, 2845, 2848 (1982). Second, because Connolly is an elected official and may have a partisan interest in the outcome of this election,

the usual presumption of his neutrality when dealing with ballot access is inappropriate and strict judicial scrutiny is in order. Kay v. Mills 490 F. Supp. 844, 852 (E.D. Ky. 1980).

Thus, in order to justify his restriction of appellant's ballot access, appellee Connolly must demonstrate a compelling state interest in imposing the "15 percent rule". Williams v. Rhodes, supra, 393 U.S. at 31, 89 S.Ct. at 11. Furthermore, under the strict scrutiny standard, even if appellee Connolly could demonstrate a state interest compelling his restriction of the fundamental rights and interests belonging to Langone and his supporters, Connolly must also demonstrate that the imposition of the "15 percent rule" and his refusal to place Langone's name upon the ballot is the least drastic of available methods by

which to achieve the state interest he sets forth. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (1960). "This requirement (of least drastic means) is particularly important where restrictions on access to the ballot are involved." Illinois v. SWP, supra, 440 U.S. at 185, 99 S.Ct. at 991.

Connolly's refusal to place Langone's name on the ballot does not further a compelling state interest. In Lubin v. Panish, supra, 415 U.S. at 715-716, 94 S.Ct. at 1319, the Court identified as a compelling state interest the provision of ballots of reasonable size. The state's need to assure that the winner of an election is the choice of a majority or strong plurality of those voting has also been identified as a compelling interest. Bullock v. Carter, supra, 405 U.S. at 145, 92 S.Ct. at 857.

The addition of Langone's name to the primary ballot would not have impeded the electoral process by producing a ballot of unreasonable size. The addition of Langone's name (and that of the similarly situated Joel Pressman) would have brought the number of candidates' names on the Democratic primary election ballot to seven. There is nothing to indicate that the voters of Massachusetts are unable to rationally discriminate among seven candidates for Lieutenant Governor in selecting the candidate of their choice. Indeed, in Lubin v. Panish, supra, 415 U.S. at 715-716, 94 S.Ct. at 1319-1320, the Court indicated that even a "laundry list" ballot would not be of concern unless "the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success" in addition

to listing major candidates already on the ballot. Id. at 1320. Further, in Williams, supra, 393 U.S. at 33, 89 S.Ct. at 11-12, the Court concluded that a mere "handful" of candidates is not sufficiently confusing in number so as to preclude ballot access. Here, the handful of seven candidates who should have been placed on the ballot would not have included the kind of "frivolous" candidates unable to demonstrate support among those qualified to vote in the primary with which the Court in Lubin, supra, was concerned. The 10,000 signature requirement of G.L. c. 53, §44, prevents this. Langone demonstrated by the 13,064 signatures gathered on his behalf that his was not a frivolous candidacy and that among those qualified to vote in the primary he had a significant modicum of support sufficient to entitle him to a place on

the ballot. In fact, Langone filed a number of signatures well in excess of those filed by two of the Democratic Lieutenant Governor candidates whose names Connolly placed on the ballot. While Langone filed 13,064 certified signatures, Louis Nickinello filed 10,493 and John Kerry filed 12,590 certified signatures. Further, Langone already occupies elective office as a Boston City Councillor and is a well-known political figure.

With regard to the interest of a state in assuring that the winner of an election be a choice of the majority or strong plurality of voters, such an interest is only at stake in the context of primary elections where there is the prospect of runoff elections which would clog a state's electoral machinery. Bullock v. Carter, supra, 405 U.S. at

145, 92 S.Ct. at 857, and at n.22. In the instant action, there was no prospect of runoff elections as they are not provided for in the State election laws. The winners of each Massachusetts party primary, whether by majority or plurality vote, are entitled to a position on the November general election ballot. Losing candidates from the primary are not afforded the right to contest primary results by running as Independent candidates in November. M.G.L. c.53, §48.

Furthermore if the Democratic Party, in addition to the state, is entitled to have a role in setting qualifications of participants in the September 14, 1982 primary election, the Democratic Party must also, as must the state itself, demonstrate that its choice of restrictions to access such as the "15 percent" requirement further a compelling interest

in the least restrictive available manner. The party becomes "an agency of the state in so far as it determines the participants in a primary election". Allwright, supra, 321 U.S. at 663, 64 S.Ct. at 765. The acts of a political party in determining qualifications of voters or candidates for participation in primary elections "do not become matters of private law because they are performed by political parties." Id.

Therefore, as state action, the restriction on ballot access imposed by the Democratic Party in the 15% requirement fails to further either of the two traditional compelling interests identified in election cases for the reasons discussed above. The party's interest in preserving its associational rights fails to satisfy the strict scrutiny standard. The Court in Allwright and Terry speci-

fically overruled its earlier analysis in Grovey that a political party could justify abridging constitutional rights on the basis of the party's voluntary and organizational character.

Even if Secretary Connolly were able to demonstrate a recognized and compelling state interest and the Democratic Party's associational interests were sufficiently compelling to justify some action restricting Langone's rights and the rights of his supporters, each must also demonstrate that the imposition of the 15% requirement is the least drastic of available means to achieve its asserted objectives. No such showing has been made, nor can it be made by Secretary Connolly. Further, the injury to the party's interest should the "15 percent rule" have been left unenforced and

Langone's name placed on the ballot would have been de minimus. Yet the rule resulted in a complete abrogation of the First Amendment rights of the appellants.

The Justices expressed concern in their Opinion of the Justices, supra, 385 Mass. at n.1, 1206, 434 N.E. 2d at n.1, 962, that unenrolled voters were permitted to sign party nomination papers and vote for party nominees in party primaries. In its consideration of the degree of control which regular party members should be entitled to exercise over the selection of party nominees, the Opinion of the Justices, at 1207, 963, suggested two less drastic means by which the Democratic Party could protect the associational rights of party regulars from this electoral influence of unenrolled voters. The party might require that only regular members of the

party could sign nomination papers for primary candidates or that only regular party members could vote in the primary. These methods would protect the party's interests and yet be far less intrusive upon the rights of the appellants and the voters than is the 15 percent requirement.

Finally, it is incongruous to have enforced the 15% requirement on the basis of a perceived associational interest of the Democratic Party where it has never been the position of the state Democratic Party that Article Six, Section III would become effective without legislation. On November 17, 1979 when the provision was passed by the party and on every date since prior to the Supreme Judicial Court's ruling in the Opinion of Justices, supra. 385 ,ass. at 1201, 434 N.E. 2d at 960, it was the intent of the Democratic State Committee, the delegates to the

1979 and 1981 conventions, and the legislative agents of the Democratic Party that the 15 percent requirement" would not become effective without legislation. To enforce the rule now, absent legislation, conflicts with the intent of the party and hence damages, rather than promotes, its associational interests.

5. Even If Enforcement of the 15% Requirement Were Proper, Appellant Langone Should Have Been Included Upon this Year's Ballot Because He Was Denied Fair Notice of the Requirements Imposed on Candidates Seeking Access to the Primary Election Ballot in Violation of the Due Process Clause of the Fourteenth Amendment.

Due to the fundamental nature of the rights implicated in the regulation of ballot access, it is constitutionally required that candidates seeking public

office be provided fair notice of the requirements for securing a place on a primary ballot. Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970). In Kay v. Mills, 490 F.Supp. 844 (E.D. Ky. 1980), the Court considered the application of a Kentucky statute providing that candidates receiving the attention of national news media would be placed on the presidential primary election ballot. The Court ruled that the Kentucky statute violated due process guarantees by vaguely setting forth the standard for ballot access and by vesting too much discretion in Kentucky's election officials. The Court stated, at 849:

> First, a citizen should not be compelled by law to engage in or refrain from activity, when he cannot intelligently discern what activity is required or prohibited. Second, a citizen's exercise of important rights may not be made subject to the unreviewable dis-

> cretion of a public official or agency.

Concluding that plaintif Kay was denied notice of the statutory requirements for ballot access because he could not have intelligently discerned what activity was required of him to gain ballot position, the Court invalidated Kentucky's ballot access statute.

In two cases with facts closely analogous to those of this case, ballot access was awarded to candidates where notice of restrictions was insufficient. In Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970), plaintiffs were candidates for alderman in the City of Chicago and were denied places upon the ballot when the city board of election commissioners enforced legitimate requirements relating to signatures upon noninating petitions that had not been enforced in the past.

In Williams v. Selafani, 444 F. Supp. 906 (S.D.N.Y.), aff'd without opinion, 580 F.2d 1046 (2d Cir. 1978), the plaintiff had been refused ballot access because signatures on his nominating petitions, while complying with publicly stated requirements set out by the city board of elections, failed to comply with the technical requirements of the law as it was later judicially interpreted. In both cases, the Courts held that the plaintiffs were entitled to positions upon the ballot even though they had not complied with the legitimate access laws because they had not been given sufficient notice that the laws would be enforced.

This case presents similar facts. Massachusetts law requires that a candidate file the necessary signatures, certificates and financial statement with

the Secretary of State. At least prior to April 23, 1982, it was the publicly represented view of the defendant Connolly in his capacity as Secretary of the Commonwealth that a candidate need only fulfill the statutory requirements to gain ballot access. This view was represented in the "state primary nomination paper", instructional pamphlets, and booklet entitled "Candidate's Guide 1982 State Elections" distributed and prepared by the Secretary. These documents were given to appellant Langone at the Secretary's office on March 4, 1982. Therefore based on the Massachusetts statutes and upon the representations made by Connolly in the documents he provided to candidates, it was appellant Langone's reasonable belief that all he need do to secure ballot position was fulfill the statutory requirements.

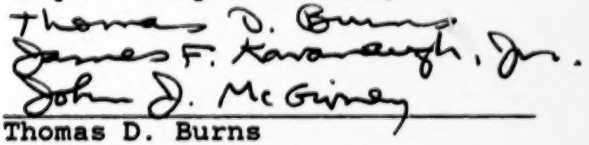
Furthermore, uncertainty over the access requirements existed even after April 23, 1982, when the Massachusetts Supreme Judicial Court issued its Opinion of the Justices. In their opinion the Justices specifically declined to determine whether the 15 percent requirement as contained in the Democratic Party Charter superceded existing statutes. 385 Mass. at 1202-1203, 434 N.E. 2d at 961. The Boston Globe reported on April 24, 1982, that in response to the Opinion of the Justices, Connolly "withheld initial comment on the ruling, saying its implications were being studied." On April 29, 1982, Connolly released a statement that the ballot status of statewide Democratic primary candidates was still "undetermined." The Boston Globe reported Connolly's statement on April 30, 1982.

Thus, until April 24, Langone rightfully assumed that existing state law requirements would be imposed by Connolly on those seeking ballot status. From April 24, 1982 through May 25, 1982, when Connolly announced the exclusion of Langone and Pressman, Langone was left to guess at what restrictions were to be placed on the exercise of his First Amendment rights. Such a set of bewildering circumstances as surrounded the qualification process for the 1982 primary ballot is not constitutionally permissible in light of the constitutional rights at stake and the due process requirement of fair notice. Hynes v. Mayor and City Council of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 1760 (1976); Socialist Workers' Party v. Davoren, 378 F. Supp. 1245, 1249. (D. Mass. 1974).

CONCLUSION

For the above-stated reasons, the appellants respectfully request that this Court note probable jurisdiction of this case.

Respectfully submitted,



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SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, July 8, 1982

IN THE CASE NO. SJC-2889

FREDERICK C. LANGONE & others

vs.

SECRETARY OF THE COMMONWEALTH & others

pending in the Supreme Judicial Court for the County of Suffolk

No. 82-214 CIVIL

ORDER

It is hereby ORDERED, that the Motion of Frederick C. Langone For Injunction Pending Appeal be, and hereby is, denied.

By the Court,

Asst.
Frederick J. Quinlan, Clerk

July 6, 1982

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, July 6, 1982

IN THE CASE NO. SJC-2889

FREDERICK C. LANGONE & others

vs.

SECRETARY OF THE COMMONWEALTH & others

pending in the Supreme Judicial Court for the County of Suffolk

No. 82-214 Civ.

ORDERED, that the following entry be made in the docket; viz., --

The reported questions are answered "No."

BY THE COURT,

_____, Asst. Clerk
Frederick J. Quinlan

July 6, 1982

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 82-214-Civil

FREDERICK C. LANGONE, et al.,
Plaintiffs,
v.
MICHAEL J. CONNOLLY, et al.,
Defendants.

RESERVATION AND REPORT

I reserve and report to the Supreme Judicial Court for the Commonwealth the following questions of law presented by the above-entitled action:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to

obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the "Charter of the Democratic Party of the Commonwealth"?

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the "Charter of the Democratic Party of the Commonwealth", but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

The foregoing questions of law are reserved and reported upon the Complaint, the Complaint of the Attorney General, the Answer and Counterclaim of the Secretary, and the Statement of Agreed Facts executed by the parties, including attachments annexed. The following schedule will be observed by the parties:

(1) The briefs of each party will be filed on June 25, 1982.

(2) The matter is set down for hearing by the full court on June 29, 1982.

_____
Associate Justice

DATED: June 18, 1982

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

FREDERICK C. LANGONE, et al,	)
Plaintiffs	)
v.	)
MICHAEL J. CONNOLLY, et al,	)
Defendants	)

JUDGMENT

This matter came on before the Court, O'Connor, J., presiding, on the rescript issued by the Supreme Judicial Court for the Commonwealth and entered in this Court.

It is Ordered and Adjudged as follows:

1. Candidates who have complied with applicable statutory requirements

need not appear upon the Democratic state primary ballots if they failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth.'

2. The decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots did not violate the constitutional or statutory rights of the voters, the candidates, or their supporters.

Dated at Boston, Massachusetts, this 7th day of July, 1982.

_____
Clerk of Court

A true copy.

Attest:

July 7, 1982
Date

_____
Clerk

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

FREDERICK C. LANGONE, MADELINE G. SARNO, VICTOR GRILLO, LOUIS FERRETTI, GAIL A. FASANO, THE LANGONE FOR LIEUTENANT GOVERNOR COMMITTEE, FRANCIS X. BELLOTTI as he is the Attorney General of the Commonwealth of Massachusetts, and JOEL PRESSMAN, Plaintiffs/Appellants	)
v.	)
MICAHEL J. CONNOLLY, as he is the Secretary of the Commonwealth of Massachusetts, DEMOCRATIC STATE COMMITTEE, SAMUEL ROTANDI, JOHN F. KERRY, LOUIS PINES, and EVELYN MURPHY, Defendants/Appellees	)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Frederick C. Langone, Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano and The Langone for Lieutenant

Governor Committee, plaintiffs/appellants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the final judgment declaring the rights of the parties entered in the Supreme Judicial Court for Suffolk County on July 7, 1982. This appeal is taken pursuant to 28 U.S.C. §1257(2). Alternatively, depending upon the precise position taken by the Supreme Judicial Court for the Commonwealth in the opinion to be issued in support of the July 7, 1982, Judgment, review by the Supreme Court of the United States may be sought by writ of certiorari pursuant to 28

U.S.C. §1257(3).

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John J. McGivney
Attorney for Plaintiffs
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CERTIFICATE OF SERVICE

I, James F. Kavanaugh, Jr., Attorney for the plaintiff herein, hereby certify that I have this day served the foregoing Notice of Appeal to the Supreme Court of the United States by mailing a copy, postage prepaid, to:

Alexander G. Gray, Jr., Esquire
E. Michael Sloman, Esquire
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108

David Berman, Esquire
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Medford, MA 02155

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225 Franlin Street
Boston, MA 02110

Paul K. Connolly, Jr., Esquire
69-83 Central Street
Boston, MA 02109

Eric E. Van Loon, Esquire
1384 Massachusetts Avenue
Cambridge, MA 02140

September 23, 1982
Date

James F. Kavanaugh, Jr.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

FREDERICK C. LANGONE, et al., Plaintiffs, Appellants,	)
v.	)
MICAHEL J. CONNOLLY, et al., Defendants, Appellees.	)

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, hereby appeals to the Supreme Court of the United States, or intends to seek review in that Court by way of a petition for a writ of certiorari from the final judgment of the Supreme Judicial Court of Suffolk County entered in this action on July 7, 1982.

Bacaue the opinion or opinions in this matter from the Supreme Judicial Court for the Commonwealth are not yet available, the Attorney General cannot determine whether review will be sought by appeal or by petition for certiorari. It is unclear whether the Massachusetts statutory scheme has been upheld or declared unconstitutional as repugnant to the Conştitution of the United States.

This appeal is therefore taken pursuant to 28 U.S.C. §1257(2) or (3).

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/
Thomas R. Kiley
First Assistant Attorney General

/s/
Alexander G. Gray, Jr.
Assistant Attorney General
Chief, Elections Division
One Ashburton Place, Room 2001
Boston, MA 02108
Telephone: (617) 727-4538

DATE: September 21, 1982

United States Constitution

First Amendment

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS
Nomination of Candidates
First Amendment

NOMINATION OF CANDIDATES

§1. Parties entitled to make nominations

At any primary, caucus or convention held under this chapter, each party having the right to participate in or hold the same may nominate as many candidates for each office for which it has the right to make nominations therein as there are persons to be elected to that office, and no more. A party which makes one or more nominations shall be entitled to have the name of each of its candidates printed on the ballot to be used at the ensuing election; but, unless the nomination is made by direct plurity vote in a primary or in several caucuses held in more than one ward or in more than one precinct or group of precincts, a certificate of nomination must be filed as provided in section five.

§2. Nominations; necessity; procedure

Except in the case of municipal nominations where a city charter or a law applying specially to a particular town otherwise provides, candidates of political parties for all elective offices, except presidential elector, shall be nominated and members of political committess, except as provided in sections one and four of chapter fifty-two, shall be elected, in primaries or caucuses, and the nomination of any party other than a

political party, in any district containing more than one ward or town, shall be made by a convention of delegates chosen by caucuses held under section one hundred and seventeen in the wards and towns of the district for which the nomination is to be made. All nominations and elections in primaries and caucuses shall be by direct plurality vote. No candidates shall be nominated, and no member of a policital committee or convention delegate elected, in any other manner than is provided in this chapter or chapter fifty-two.

§9 Certificate of nomination and nomination papers, certification of candidate as registered voter; acceptance; statement of financial interest; filing

Certificates of nomination and nomination papers for state offices shall be filed with the state secretary and he shall forthwith issue to the candidate or other person filing the same a certificate acknowledging the time and date of the receipt thereof. Certificates of nomination or nomination papers for city and town offices shall be filed with the city or town clerk. Any candidate not required by section fortyeight of this chapter to file a certificate of party enrollment shall, on or before the last day provided by law for filing nomination papers, file a certificate from the registrars of voters of the city or town wherein such candidate is a registered voter, certifying that such a certificate issue forthwith upon request of any such candidate so registered or of his author-

ized representative. No nomination paper shall be received or be valid unless the written acceptance of the candidate for public office, as defined by chapter 268B, shall be accepted by the state secretary nor be valid unless accompanied by a receipt from the state ethics commission verifying the fact that a statement of financial interest has been filed pursuant to the provision of said chapter 268B.

Amended by St. 1976, c. 86; St. 1978, c. 210, §3.

§44. Nomination papers; number of signatures

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of the governor, lieutenant-governor, attorney general and United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters; in the case of the state secretary, state treasurer and state auditor, they shall be signed by at least five thousand voters. Such papers for all other offices to be filled at a state election shall be signed by a number of voters as follows: for representative in congress, two thousand voters; for councillor, district attorney, clerk of courts, register of probate and insolvency, register of deeds, county commissioner, sheriff and county treasurer, one thousand voters, except that in Barnstable, Berkshire, Franklin, and Hampshire counties such papers for

nomination to the office of clerk of courts, register of probate and insolvency, register of deeds, county commissioner, sheriff and county treasurer shall be signed by five hundred voters; for state senator, three hundred voters; for representative in the general court and commissioners to apportion Suffolk county, one hundred and fifty voters. If ten percent of the number of voters in the respective district who are enrolled in the party whose nomination the candidate seeks is a lesser number than the number otherwise required by the preceding sentence, then the number of voters shall be such ten per cent or shall be fifty per cent of the number of voters otherwise required by the preceding sentence, whichever is greater. The total number of such enrolled voters shall be determined from the records in the office of the state secretary. In Dukes and Nantucket counties such papers for nomination to all offices within the county to be filled at any state election shall be signed by twenty-five voters.

No nomination paper for use in the nomination of candidates to be voted for at state primaries shall contain the name of more than one candidate.

Whoever knowingly subscribes falsely to a statement on a primary nomination paper shall be punished by a fine of not more than fifty dollars.

§46. Nomination papers; submission to registrars; certification, correction of district; number of names

Every nomination paper of a candidate for a city or town office shall be submitted, on or before five o'clock post meridian of the seventh day preceding the day on which it must be filed, to the registrars of the city or town in which the signers appear to be voters. Every nomination paper of a candidate for state office shall be submitted on or before five o'clock post meridian of the twenty-eighth day preceding the day on which it must be filed with the state secretary to the registrars of the city or town in which the signers appear to be voters. Every nomination paper of a candidate for president at the presidential primaries shall be submitted to said registrars on or before five o'clock post meridian of the fourteenth day before the final date for filing said papers with the state secretary and certification of said papers shall be completed no later than the seventh day before the final day for filing said papers with the state secretary. Nomination papers for candidates for state, ward, and town committees shall be submitted to said registrars on or before five o'clock post meridian on the eleventh day before the final day for filing with the state secretary and certification shall be completed no later than the fourth day before the final day for filing said papers with the state secretary. Each nomination paper shall be marked with the date and time it was sub-

mitted and such papers shall be certified in order of submission. Said registrars shall check each name to be certified by them on the nomination paper and shall forthwith certify thereon the number of signatures so checked which are names of voters oth in the city or town and in the district for which the nomination is made, and who are not enrolled in any other party than that whose nomination the candidate seeks, and only names so checked shall be deemed to be names of qualified voters for the purpose of nomination. The registrars shall place next to each name not checked symbols indicating the reason that name was disqualified. The certification of voters shall be signed by a majority of the board of registrars.

The registrars shall inform the candidate submitting such papers if the designation of the district only in which he seeks office is incorrect, and shall give said candidate the opportunity to insert the correct designation on such papers before the signatures are certified. The registrars shall, if the candidate so desires, allow a change of district on the nomination papers, and the registrar and the candidate shall both initial the change of district so made and further shall in writing explain the change of district causing three copies to be made, one of each for the registrar and candidate and one to be attached to the nomination papers. If the correct district desgnation is not so

inserted, the nomination papers shall not be approved. In no case may a correction be made to change the office for which such candidate is nominated.

The provisions of section seven relative to the number of names to be certified and received, and, except as otherwise provided in this section, the provision relative to time of certification shall apply to such papers. For the purpose of certifying the names of primary nomination papers the registrars shall hold meetings on the four Tuesdays next preceding the seventh day before the final day on which such papers are required to be filed with the state secretary, except that for primaries before special elections the meetings shall be held on the two Tuesdays next preceding such date, and except that for presidential primaries, the meetings for certifying papers for candidates for state, ward, and town committees shall be held on the four Tuesdays next preceding the fourth day before the final day for filing said papers with the state secretary, except that the fifth Tuesday shall be substituted for that Tuesday on which any city or town holds its local election.

No person shall be a candidate for nomination for more than one office; but this shall not apply to candidates for membership in political committees.

§48. Nomination papers, time for, and acknowledgment of, filing; certificate to printing name on ballot

Nomination papers of candidates to be voted on at presidential primaries except candidates for state, ward and town committees, shall be filed with the state secretary on or before the first Friday in January preceding the day of the primaries.

Nomination papers of candidates for election to state, ward and town committees at presidential primaries shall be filed with the state secretary on or before the third Tuesday in November of the year preceding said presidential primaries.

All certificates of nomination papers of candidates for the office of state representative, state senator, executive council, or county office shall be filed with the state secretary on or before the last Tuesday in May of the year in which a state election is to be held. Certificates of nomination or nomination papers for the office of senator in congress, representiave in congress, governor, lieutenant governor, attorney general, treasurer and receiver general, state auditor and state secretary, shall be filed on or before the first Tuesday in June of the year in which a state election is to be held. In the case of primaries before special elections, such nomination papers shall be filed on or before the fifth Tuesday preceding the day of the primaries. The state secretary shall forthwith issue to the candidate or other person filing such nomination papers a certificate acknowledging the time and date of the receipt thereof.

There shall not be printed on the ballot at the state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth, or for represenative in congress, governor's councillor, senator in the general court, representative in the general court, district attorney, clerk of court, register of probate and insolvency, register of deeds, county commissioner, sheriff, or county treasurer, unless a certificate from the registrars of voters of the city or town wherein such person has been a registered voter for more than ninety days and that he has been enrolled as a member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day herein provided for filing nomination papers with the state secretary is filed with the state secretary on or before such filing deadline. Said registrars shall issue such a certificate, signed by a majority thereof, forthwith upon request of any such candidate so enrolled or of his authorized representative. Said registrars of voters shall issue such certificate to any person seeking the nomination of a political party, who is a newly registered voter of that city or town enrolled in that political party, and who has not been an enrolled member of another political party during the year preceding the last day for filing nomination papers with the state secretary. No such certificate shall be issued to any person who is a candidate for nomination for any such office, if

such person has been an enrolled member of another political party during the year prior the last day for filing nomination papers with the state secretary as provided by this section.

There shall not be printed on the ballot at a city or town primary the name of any person as a candidate for nomination for any office to be filled . . a city or town election unless such person has become an enrolled member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day for submitting primary nomination papers to the registrars of voters prior to said primary.

The name of a candidate for election to any office who is nominated otherwise than by a political party, generally referred to as an "Unenrolled" candidate, shall not be printed on the ballot at a state election, or on the ballot at any city or town election following a city or town primary, unless a certificate from the registrars of voters of the city or town wherein such person is a registered voter, certifying that he is not enrolled as a member of any political party, is filed with the state secretary or city or town clerks on or before the last day herein provided for filing nomination papers. Said registrars shall issue each certificate forthwith upon request of any such candidate who is not a member of a political party or his authorized representative. No such certificate shall be issued to any such candidate who shall have been an enrolled member of any political party ninety days prior to the

last day for filing nomination papers as provided by this section.

82-936

S-2889 S.J.C.

FREDERICK C. LANGONE & others[1] vs. SECRETARY OF THE COMMONWEALTH & others.[2]

Office-Supreme Court, U.S.
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O'CONNOR, J. Frederick C. Langone, four voters who claimed to be supporters of Langone's candidacy for Lieutenant Governor

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[1] Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, referred to herein as the Langone supporters, The Langone for Lieutenant Governor Committee, Joel M. Pressman, and plaintiff-intervenor, Francis X. Bellotti, as Attorney General of the Commonwealth.

[2] The Democratic State Committee, Evelyn F. Murphy, Samuel Rotondi, Louis R. Nickinello, John F. Kerry, and Lois E. Pines.

of the Commonwealth, and The Langone for Lieutenant Governor Committee, brought this action in the Superior Court against the Secretary of the Commonwealth. The complaint alleged that, by refusing to print Langone's name on the September 14, 1982, Democratic State party primary ballot as a candidate for the party's nomination for Lieutenant Governor, the Secretary deprived the plaintiffs of various rights provided by statutes of the Commonwealth and guaranteed by the United States and Massachusetts Constitutions. An injunction was sought that would have required the Secretary to place Langone's name on the primary ballot. The other defendants, whose names appeared on the primary ballot, and Joel M. Pressman, as plaintiff, were added to the case on the Secretary's motion. The Attorney General intervened as a plaintiff and filed a complaint seeking declaratory relief and an order requiring the Secretary to place the names of Langone, Pressman, and "other candidates who have fully complied with all applicable statutory requirements imposed by G. L. c. 53, on the ballot for the state primary for the Democratic Party, notwithstanding any contrary provision of the party charter."

A single justice of this court allowed a joint "Petition for Transfer" to the Supreme Judicial Court for Suffolk County, and on a motion by all the parties, reserved and reported to the full court the following questions of law:

"1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth'?

"2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth', but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?"

On July 6, 1982, we issued an order that said "[u]pon consideration of the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary must give effect to the relevant charter provision. Accordingly, we answer the questions reported, 'No.'" This opinion is an explanation of that order.

On April 23, 1982, the Justices of this court issued an advisory opinion to the Governor. Opinion of the Justices, 385 Mass. 1201 (1982). The first sentence of G. L. c. 53, § 44,

as amended through St. 1981, c. 278, § 1, states, "The nomination of candidates for nomination at State primaries shall be by nomination papers." There was pending before the Governor for his approval, House Bill No. 5852, which would have added, after that sentence, the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." The proposed language, if constitutional, would have rendered ineffective Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts which provides: "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election." This is popularly known as the 15% rule. The Justices interpreted the proviso to mean that a convention nominee who fails to receive at least 15% of the convention vote on any ballot is not entitled to have his or her name placed on the primary ballot. Id. at 1025.

The Justices advised the Governor that "[i]f House No. 5852 were approved, G. L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter." Id. at 1207-1208.

On May 21 and 22, 1982, the State Democratic party held its convention for the purpose of endorsing its candidates for statewide office. The defendants Murphy, Rotondi, Kerry, Pines, and Nickinello received at least 15% of the convention vote cast on one or more ballots. The plaintiffs Langone and Pressman failed to obtain at least 15% of the vote on any ballot. On May 25, 1982, the chairman of the Democratic State Committee sent a certified copy of the party charter to the Secretary and gave him the names of those individuals who had obtained at least 15% of the vote on one or more ballots, the Secretary released a statement that pursuant to the April 23 Opinion of the Justices, supra, he would be unable to place on the State primary ballot the names of Langone and Pressman although they had filed valid nomination papers. On the following day the director of elections sent letters to Langone and Pressman containing the same information. This action was commenced on June 2, 1982.

Candidates of political parties for statewide office in this Commonwealth are nominated at primaries held for that purpose. G. L. c. 53, §§ 2, 41. General Laws c. 53 provides several

requirements for primary ballot access, including requirements that only persons certified as enrolled members of a political party may be candidates for that party's nomination, § 48, and that candidates for the nomination of a political party must file nomination papers containing at least 10,000 certified voter signatures. G. L. c. 53, § 44.[3] General Laws c. 53, § 44, further provides that "[t]he nomination of candidates for nomination at state primaries shall be by nomination papers," and § 2, as appearing in St. 1975, c. 600, § 7, provides that "[n]o candidates shall be nominated . . . in any other manner than is provided in this chapter or chapter fifty-two."[4] These several sections of G. L. c. 53 may reasonably be construed in two ways: as providing the only requirements for primary ballot access, excluding all others, or, in the alternative, as providing minimum requirements for primary ballot access but permitting imposition by the party of additional requirements that are consistent with a primary election system and do not infringe the constitutional rights of candidates and voters. Under the first construction, a candidate who satisfies the express statutory requirements would have a right to the printing of his or her name on the primary ballot. Under the second construction, compliance with the express statutory requirements would not entitle candidates

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[3] Both Langone and Pressman had complied with the requirements of G. L. c. 53, § 44, by filing nomination papers containing more than 10,000 certified voter signatures.

[4] General Laws c. 52 is irrelevant to the present inquiry.

to appear on the ballot in the absence of compliance with the party rule also. If we were to adopt the first construction, we think that G. L. c. 53 would be unconstitutional. However, we think that, since the provisions of G. L. c. 53 are not expressly preemptive, the second construction is permitted by reasonable principles of construction and would avoid constitutional difficulties. Therefore, we adopt it. "It is our duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit it." School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79-80 (1982). Staman v. Assessors of Chatham, 351 Mass. 479, 486-487 (1966). We discuss below our reasons for concluding that constitutional considerations require the second construction of G. L. c. 53.

In Opinion of the Justices, 385 Mass. at 1204, the Justices stated that the right to associate with the political party of one's choice is an integral part of the freedom of association for the advancement of common political beliefs protected by the First and Fourteenth Amendments to the Constitution of the United States. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). The Justices further stated that there is implicit in that freedom a political party's substantial interest in ensuring that party members have an effective role in determining who will appear on a general election ballot as that party's candidate, citing Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1981).

The Justices noted that the winner by a plurality of a party primary in this Commonwealth becomes that party's candidate in the general election, and that voting in the party primary is open both to voters who are enrolled as party members before the primary and to those who are unenrolled until they request that party's ballot at the polls. G. L. c. 53, § 37. They noted also that the registered voters who sign nomination papers need not be members of the party. G. L. c. 53, § 46. It followed that if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership." Id. at 1205. The Justices concluded that this would substantially infringe the Democratic party's right of freedom of association, id. at 1206, and that the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. Id. at 1207.

In answering the questions reported by the single justice in the case before us, we recognized that advisory opinions, "although necessarily the result of judicial examination and deliberation, are advisory in nature, . . . not adjudications by the court, and do not fall within the doctrine of stare decisis." Commonwealth v. Welosky, 276 Mass. 398, 400, cert. denied, 284 U.S.

684 (1931). "In accordance with our duty, we examine[d] the [questions reported by the single justice] anew, unaffected by the advisory opinion." Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 314 (1950). We were aided in that effort by the oral arguments and briefs of the parties. We again concluded that G. L. c. 53 would substantially infringe the Democratic party's fundamental right of association if it eliminated the 15% rule, thus necessitating strict scrutiny, which it does not survive. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93, 101. More of an intrusion on the party's fundamental right of association than is required to protect the Commonwealth's compelling interest in the integrity of the election process, American Party of Texas v. White, 415 U.S. 767, 783 (1974), Kusper v. Pontikes, 414 U.S. 51 (1973), Rosario v. Rockefeller, 410 U.S. 752 (1973), is not constitutionally permissible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). The Commonwealth's interest in the integrity of the election process does not require, and therefore does not permit, preclusion of a party rule that reserves to its convention delegates the right to bar from the party's primary ballot candidates who lack the support of at least 15% of those delegates on any convention ballot.

In Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1981), the United States Supreme Court struck down a State statute that compelled the Democratic party, contrary to national party rules,

to seat delegates at its national convention who were bound by the statute to vote on the first ballot in accordance with the results of an open primary. An open primary is one in which any registered voter can participate regardless of party affiliation and without publicly declaring it. The plaintiffs argue that Democratic Party of U.S. v. Wisconsin, supra, stands only for the proposition that a State may not interfere with the internal affairs of a national political party, such as the naming of the party's delegates to its national convention. We think that the principle enunciated in that case is not so narrow. The Court phrased the question before it as "whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules." Id. at 120. Reasoning that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions — thus impairing the party's essential functions — and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles,' Ray v. Blair, 343 U.S. 214, 221-222 [1952]," id. at 122, the Court held that "if Wisconsin . . . open[s] its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules." Id. at 126. To be sure, the Court declared

that the Wisconsin statute impermissibly interfered with the party's internal affairs, as the plaintiffs point out, but it is significant that the Court's focus was on the nature of the interference, which was the imposition on the party of convention votes for the party's presidential nominee that may not have reflected the choice of party members.

In order to vote at a Massachusetts primary, an unenrolled voter may enroll in a political party at the polling place immediately before voting, and receive that party's ballot. G. L. c. 53, § 37. The voter may become unenrolled again, or change his or her enrollment on the day following the primary. G. L. c. 53, § 38. This section also provides that at primaries a clerk shall make available within the polling place certificates to enable a voter to make such changes. Since these provisions require that party affiliation be publicly declared, the Massachusetts primary is not technically "open" as was the Wisconsin primary in Democratic Party of U.S. v. Wisconsin, supra, but the availability of party affiliation to unenrolled voters, which can be little more than momentary and may be for a purpose that is entirely inconsistent with, or at least unsupportive of the principles of the party, blurs any meaningful distinction between open and closed primaries. See Democratic Party of U.S. v. Wisconsin, supra at 133 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Such affiliation demonstrates neither commitment to, nor acceptance of, the political, social, and economic philosophies and programs for which the party has organized. "[A] political party has a legitimate — indeed, compelling — interest in ensuring that its selection process

accurately reflects the collective voice of those who, in some meaningful sense, are affiliated with it. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being" (emphasis added). L. Tribe, American Constitutional Law 791 (1978).

Since nomination papers may be signed by unenrolled voters, G. L. c. 53, § 46, and since voters at the primary may have only a tenuous affiliation with the party, c. 53, § 37, if G. L. c. 53 nullifies a party rule requiring that a candidate for nomination have a modicum of support from members with substantial affiliation with the party, it as effectively eliminates that party's control of who its candidates in general elections will be as did the Wisconsin statute held unconstitutional in Democratic Party of U.S. v. Wisconsin, supra. We view this as a substantial interference with the fundamental rights of association guaranteed to the party and its members by the First and Fourteenth Amendments. Therefore, we reject a construction of G. L. c. 53 that would render ineffective all party rules governing primary ballot access, and we construe the statute as permitting any such rule that neither defeats the purpose of a primary election system nor violates the constitutional rights of candidates or voters.

We turn to a consideration whether a construction of G. L. c. 53 as recognizing the Democratic party's 15% rule

would defeat the legislative purpose in providing for primary elections, and we conclude that it would not. The aim of the primary system is the encouragement of wide participation in politics and discouragement of candidate selection by party bosses. Democratic Party of U.S. v. Wisconsin, supra at 127 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Popular participation in the candidate selection process is assured by G. L. c. 53, § 44, requiring nomination papers signed by at least 10,000 registered voters, and by c. 53, § 37, which provides that primary votes may be cast by persons who are unenrolled until they go to the polls. This broad citizen participation is not negated by application of the 15% rule. The fact that five candidates for selection as the Democratic party's candidate for Lieutenant Governor received sufficient delegate support to satisfy the party charter requirement warrants the inference that the selection process was not dominated by party bosses. The 15% rule does not defeat the legislative purpose in adopting a primary system. We need not consider at what point the legislative purpose would be defeated by a different party rule requiring a higher percentage of delegate support.

Primary elections are the creatures of statute and are an integral part of the election process. United States v. Classic, 313 U.S. 299, 314 (1941). Enforcement by the Commonwealth of the 15% rule is State action and is, therefore, subject to

constitutional scrutiny. Bullock v. Carter, 405 U.S. 134, 140 (1972). Terry v. Adams, 345 U.S. 461 (1953). Shelley v. Kraemer, 334 U.S. 1 (1948). Smith v. Allwright, 321 U.S. 649 (1944). Nixon v. Condon, 286 U.S. 73 (1932). Nixon v. Herndon, 273 U.S. 536 (1927). See L. Tribe, American Constitutional Law 787 (1978).[5] For the purpose of evaluating the plaintiffs' claims that the 15% rule violates rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G. L. c. 53. See L. Tribe, American Constitutional Law 790 n.2 (1978).

We have concluded that G. L. c. 53 would violate the constitutional rights of the Democratic party and its members if it were to exclude every form of primary ballot access control by party members with a more substantial party affiliation than is demonstrated by accepting a Democratic party ballot on primary election day. We have also concluded that enforcement of the 15% rule would not defeat the legislative purpose in adopting a primary system. We must further inquire whether G. L. c. 53, as augmented by the 15% rule, would deprive the plaintiff candidates or voters of rights of free speech and association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States and arts. 1, 16, and 19 of the Massachusetts Declaration of Rights, or would violate their rights to equal

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[5] We have recently held that the protection of art. 9 of the Massachusetts Declaration of Rights is not from State action alone. Batchelder v. Allied Stores Int'l, Inc., 387 Mass. 83, 88 (1983). But since we find State action present, we need not decide whether that case negates the necessity of State action under our State Constitution.

protection secured by the Fourteenth Amendment or their rights to freedom and equality of elections secured by art. 9 of the Declaration of Rights. The same basic issues relative to the United States Constitution must be addressed whether our analysis be in First Amendment or equal protection terms.

The first question to be resolved is whether State enforcement of the 15% rule must withstand strict scrutiny or only a rational basis test. Strict scrutiny is required if the interests asserted by the plaintiffs are fundamental and the infringement of them is substantial. Bullock v. Carter, 405 U.S. 134, 142-144 (1972). In that event, the 15% rule must serve a compelling State interest with as little infringement as possible in order to be constitutionally permissible. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93, 101. On the other hand, if the asserted interests are not fundamental or the impact on them of the 15% rule is not substantial, State enforcement of the rule is constitutional if it is rationally based. Bullock v. Carter, supra.

Langone and Pressman assert that enforcement of the 15% rule abridges their rights of candidacy, and the Langone supporters and the Langone Committee assert interference with their rights as voters. Although the right to run for public office may not be a fundamental right, see Bullock v. Carter, supra at 142-143, but see Mancuso v. Loft, 476 F.2d 187, 195 (1st Cir. 1973), and it clearly is not absolute, Opinion of the Justices, 375 Mass. 795, 811 (1978), the right to vote is fundamental, Harper v.

Virginia Bd. of Elections, 383 U.S. 663, 667 (1966), Reynolds v. Sims, 377 U.S. 533, 561-562 (1964), see Sears v. Secretary of the Commonwealth, 369 Mass. 392, 399 (1975), and restrictions on the access of candidates to the ballot inevitably have impact on voters' rights. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). Lubin v. Panish, 415 U.S. 709 (1974). Bullock v. Carter, supra at 143. Therefore, we treat the interests asserted by the candidates, as well as those asserted by the voter plaintiffs, as fundamental.

A determination whether the restrictions on primary ballot access resulting from the application of G. L. c. 53, and the 15% rule have a sufficient impact on the plaintiffs' fundamental interests to compel strict scrutiny, requires an examination of that impact "in a realistic light." Bullock v. Carter, supra at 143. Clough v. Guzzi, 416 F. Supp. 1057, 1066 (D. Mass. 1976). We are satisfied that the burden on candidacy and voting rights that results from enforcement of the 15% rule is insufficient to warrant strict scrutiny and that the appropriate inquiry is whether the effect of G. L. c. 53, supplemented by the 15% rule, is rationally related to the furtherance of legitimate State interests. See Storer v. Brown, 415 U.S. 724, 733-736 & n.7 (1974) (statute disqualifying independent candidate who was registered member of any party within one year prior to primary election, valid); Jenness v. Fortson, 403 U.S. 431 (1971) (independent candidates required to submit petition with signatures of 5% of the eligible voters).

We begin our examination of the impact of the 15% rule with the observation that discrimination between those who gain the support of at least 15% of the convention delegates and those who do not is not invidious. Enforcement of the 15% rule does not deny candidates access to the primary ballot in an unfair way, such as by imposing prohibitive filing fees. See Bullock v. Carter, supra. Everyone who seeks to have his or her name printed on the Democratic primary ballot has the same opportunity to gather the necessary signatures and convention support. No one is required to obtain a greater percentage of the delegate votes than anyone else. That reasonable opportunity exists to garner the necessary delegate support is demonstrated by the fact that five candidates for the Democratic nomination for Lieutenant Governor did so.

Participation in a primary is not the only route available to the plaintiffs to enable them to associate and express political ideas. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93. A candidate for statewide office is entitled to appear on the general ballot as an independent by compliance with the provisions of G. L. c. 53, § 6. To the extent, however, that the plaintiffs wish to associate and express their ideas as Democrats, those ideas may be represented by the several candidates who obtained the requisite convention support. Every voter cannot be assured that a candidate to his liking will be on the ballot. Lubin v. Panish, supra at 716. "So long as the ideas in which a potential candidate and other party members believe can be represented by another candidate, the primary purpose of political

association has been served. A candidate may, of course, prefer to be the party nominee, but judicial cognizance of that interest as an element of associational rights would be merely a backdoor way of establishing [an absolute] right to candidacy." Developments in the Law — Elections, 88 Harv. L. Rev. 1111, 1176, 1177 (1975).

Not only does the Commonwealth have a legitimate interest in protecting the constitutional rights of the Democratic party and its members to associate, see South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966), but it also has a proper interest "in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." Tansley v. Grasso, 315 F. Supp. 513, 517 (D. Conn. 1970). This interest is served by assuring that candidates who appear on the general election ballot as representatives of the Democratic party are truly representative of the party as demonstrated by the support of at least 15% of the party's convention delegates on one or more convention ballots. "The preservation of the integrity of the various routes to the ballot is a proper State objective." Opinion of the Justices, 368 Mass. 819, 823 (1975). We conclude, therefore, that G. L. c. 53, supplemented by the 15% rule, is rationally related to legitimate State interests and does not violate any rights guaranteed to the plaintiffs by the United States Constitution.[6]

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[6] Langone contends that he had insufficient notice of the requirements for primary ballot access and that therefore his right to due process guaranteed by the Fourteenth Amendment was violated by the failure of the Secretary to print his name on

Although the plaintiffs claim that State implementation of the 15% rule would violate rights guaranteed to them by arts. 1, 9, 16, and 19 of the Massachusetts Declaration of Rights,[7] they advance no separate reasons, and we are unaware of any, to conclude that the Massachusetts Constitution affords them protection not provided by the First and Fourteenth Amendments of the United States Constitution. We have previously

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the primary ballot. This contention is without merit. In December, 1981, the Democratic party issued its "Preliminary Call to Convention," which gave clear notice that the party would be holding its endorsing convention pursuant to Article Six of the party's charter. Any assumption that G. L. c. 53 provided the exclusive requirements for primary ballot access was unwarranted.

[7] These articles of the Massachusetts Declaration of Rights state:

Article 1, as appearing in art. 106 of the Amendments to the Massachusetts Constitution, provides: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Article 9 provides: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

Article 16, as appearing in art. 77 of the Amendments to the Massachusetts Constitution, provides: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged."

Article 19 provides: "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

said that the freedoms protected by arts. 16 and 19 are "comparable" to those guaranteed by the First Amendment. First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 792 (1977), rev'd on other grounds, 435 U.S. 765 (1978). Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 249 (1946). The Justices have said that "[t]he Massachusetts Constitution does not refer to primaries as such, but concerns itself only with elections." Opinion of the Justices, 359 Mass. 775, 776-777 (1971). Even if the Massachusetts Constitution were to apply to primaries because of their effect on general elections, "the right 'to be elected,' preserved in art. 9, is not absolute. It is subject to legislation reasonably necessary to achieve legitimate public objectives." Opinion of the Justices, 375 Mass. 795, 811 (1978). See Opinion of the Justices, 368 Mass. 819, 823 (1975).

Thus, we have completed the constitutional analysis which requires that we construe G. L. c. 53 not to exclude, but rather, to accommodate the 15% rule. No candidate who fails to obtain at least 15% of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III, of the "Charter of the Democratic Party of the Commonwealth" must appear on the Democratic State primary ballot. The decision of the Secretary of the Commonwealth to that effect did not violate the constitutional or statutory rights of the voters, candidates, or candidates' supporters.

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No. 82-936.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

FREDERICK C. LANGONE, ET AL.,
APPELLANTS,

v.

MICHAEL J. CONNOLLY, AS HE IS SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Supplemental Brief in Support of Motion to Dismiss.

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INTRODUCTION

The Jurisdictional Statement filed in connection with this case (No. 82-936) by Frederick C. Langone ("Langone"), Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, and The Langone For Lieutenant Governor Committee (collectively referred to as "Langone supporters") was received on December 6, 1982. On January 5, 1983 Michael J. Connolly, as he is Secretary of State of the Commonwealth of Massachusetts ("State Secretary"), filed a Motion to Dismiss in this case and a related case (No. 82-927). The State Secretary received Appellants' Brief Opposing Motion to Dismiss of Appellee, Connolly ("App. Br.") on February 11, 1983. This Supplemental Brief in Support of Motion to Dismiss is filed calling attention to matters raised

in appellants' Brief which were not available at the time the State Secretary filed his Motion to Dismiss. Sup. Ct. R. 16.6.

STATEMENT OF FACTS

Langone and Langone supporters state that "[t]here are a number of important factual inaccuracies contained in the Motion to Dismiss of Appellee Connolly which are of significance to the issues before this Court." (App. Br. at 1) Three "inaccuracies" are enumerated. (App. Br. at 1-5) They will be discussed seriatim.

First, Langone and Langone supporters state that Langone did not seek the "nomination of the Massachusetts Democratic Party 'by means of pasters or write-ins.'" (App. Br. at 1-2) This statement is erroneous. The Statement of

Agreed Facts discloses that Langone announced his candicacy on March 29, 1982 and that he filed nomination papers with the State Secretary on May 26, 1982. Langone did not withdraw his candicacy. After June 4, 1982 it was too late for Langone to withdraw. Mass. Gen. Laws ch. 53, §§13 and 25. (Motion to Dismiss at 6 n. 6 & App. 27) It is also noteworthy that Langone accepted limited public financing as a candidate after he was notified that his name would not appear upon the Democratic state primary ballots. (Motion to Dismiss at 41 n.25 & App. 46) If Langone did not wish to seek the nomination of the Massachusetts Democratic Party "by means of pasters or write-ins" (Mass. Gen. Laws ch. 53, §§3, 35B and 40) (Motion to Dismiss at 40-41 & App. 23, 27, 33) he was required by

statute to file a formal request to withdraw with the State Secretary.

Langone and Langone supporters also quote (App. Br. at 2) the statement in the State Secretary's Motion to Dismiss that: "If [Langone] had received write-in votes in an amount sufficient to give him a plurality of the votes cast in the primary, he would have been the Party's nominee. Mass. Gen. Laws ch. 53, §§2, 40. (App. 22, 33)." (Motion to Dismiss at 40) By including this statement in their list of "inaccuracies" Langone and Langone supporters intimate that the statement is incorrect. Significantly, they do not, and cannot, challenge its accuracy.

Second, Langone's pre-convention statement, which was annexed to and incorporated by reference in the State-

ment of Agreed Facts, does begin with a sentence that describes the Endorsing Convention as "non-binding." (App. Br. at 3-4) The very next sentence, however, clarifies Langone's beliefs concerning the Convention. Langone complains that the "Primary should be open to anyone who obtains the necessary number of certified signatures for a statewide constitutional office." He then decries any attempt "[t]o limit candidates for any office." Any fair reading of Langone's entire pre-convention statement in context discloses that he was fully aware of the impact of the "fifteen percent rule."

The third and final "inaccuracy" listed by Langone and Langone supporters (App. Br. at 4-5) blurs the distinction between an announced candidate and a qualified candidate. Any person can

announce his or her candidacy for office. However, unless and until that person satisfies pertinent statutory requirements for candidacy, he or she is not a qualified candidate. Langone announced his candidacy on March 29, 1982. As an announced candidate, "Langone was sent a copy of an announcement released by the State Secretary on April 9, 1982 which informed Langone that the Governor had requested the advisory opinions of the Justices. All [announced] candidates were invited to file briefs with respect to the question of the 'fifteen percent rule.' Langone did not accept this invitation." (Motion to Dismiss at 61-62) (emphasis original) Until Langone submitted nomination papers on May 26, 1982, the State Secretary did not know and could not have known that Langone was

a qualified candidate.

In sum, the assertions of Langone and Langone supporters are "inaccuracies." The statements in the Motion to Dismiss are correct.

JURISDICTION OF THIS COURT

Langone and Langone supporters assert that in this case "there were two distinct challenges to the constitutionality of the Massachusetts statutory scheme for obtaining access to the state primary election [sic] ballot. M.G.L. c. 53, §§1 et. seq." (App. Br. at 5-6) To the contrary, as demonstrated in the Motion to Dismiss, "no party in this case has ever challenged the constitutionality of any statute" (Motion to Dismiss at 2-6) (emphasis original), much less the Massachusetts "statutory scheme" for primary ballot access.

The statutory filing requirements for primary ballot access are: nomination papers signed by at least 10,000 registered voters; written acceptance of nomination; certification of party enrollment; and financial interest statement. (Motion to Dismiss at 27 n.16) None of these statutory requirements has been challenged. Langone and Langone supporters challenge only the validity and enforcement of the "fifteen percent rule." (Motion to Dismiss at 4 n.4 & App. 3-4) Therefore, the statutorily-prescribed requirements for primary ballot access are "not sufficiently drawn in question" to sustain appellate jurisdiction. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562-63 n.4 (1980).

The first asserted "challenge" to the "statutory scheme" is based on a misreading of the Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982), and a misstatement of the issues presented in this case. In the Opinion of the Justices, the Justices of the Massachusetts Supreme Judicial Court unanimously opined that Massachusetts House Bill No. 5852, a proposed amendment to Mass. Gen. Laws. ch. 53, §44, "would abridge the constitutional rights of the Democratic party and its members to associate." Id. at 1207-08, 434 N.E.2d at 964. After the Opinion of the Justices was issued, House Bill No. 5852 was recalled from the Governor to the Senate and no further action was taken on the bill. Thus, the proposed amendment addressed in the Opinion of the Justices

is not at issue here.

Langone and Langone supporters mistakenly assert that:

> Among the questions presented to the Supreme Judicial Court ... were whether enforcement of the provisions of M.G.L. c.53, §§1 et seq., required that Langone's name be placed on the state primary election [sic] ballot notwithstanding his failure to meet the state Democratic Party's "fifteen percent requirement" and whether enforcement of the provisions of M.G.L. c.53, §§1 et seq., would infringe or abridge the constitutional rights of the Democratic Party and its members. (App. Br. at 7-8)

Neither question was presented to the Massachusetts Supreme Judicial Court. The two questions presented to that court are delineated in the Reservation and Report. (Motion to Dismiss at 10 & App. 8). They inquire whether the name of a candidate, such as Langone,

who has "complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure" to comply with the "fifteen percent rule" and whether the State Secretary's decision not to place the name of such candidates upon the Democratic state primary ballots violated the constitutional rights of those candidates. Compliance with the "statutory scheme" was assumed. No statute was challenged.

The questions presented to the Massachusetts Supreme Judicial Court involved a contest between the constitutionally-recognized rights of the Massachusetts Democratic Party and alleged constitutional rights of Langone and Langone supporters. The interpretation and application of the "statutory

scheme" for primary ballot access was not involved.

The second asserted "challenge" to the "statutory scheme" is:

> [W]hether M.G.L.c.53, §§1 et seq., is facially invalid as it fails to provide fair notice of appellee Connolly's and the appellee Democratic State Committee's authority to impose ballot access requirements contained in political party rules or whether the statute was invalidly applied to the appellants. (App. Br. at 10)

Suffice it to say, this "challenge" has been fabricated. The gist of this "challenge" is that Langone and Langone supporters did not receive "fair notice" of the effect of the "fifteen percent rule." The "statutory scheme" is not involved. Once again, the statutory requirements are "too tangentially involved to satisfy" statutory appellate jurisdiction. Garrity v. New Jersey,

385 U.S. 493, 496 (1967).

In sum, this case involves only a final judgment rendered by the highest court of Massachusetts where rights are claimed under the United States Constitution. 28 U.S.C. §1257(3). Accordingly, this Court should regard the Jurisdictional Statement of Langone and Langone supporters as if they seek review by writ of certiorari. 28 U.S.C. §2103.

ARGUMENT

LANGONE'S CLAIM THAT HE DID NOT RECEIVE FAIR NOTICE OF THE EFFECT OF THE FIFTEEN PERCENT RULE IS NOT CAPABLE OF REPETITION.

Langone's "fair notice" claim is moot. (Motion to Dismiss at 60 n.34). The 1982 Massachusetts Democratic state primary and the 1982 Massachusetts general election are history. It is now impossible to grant Langone's request

that his name be placed upon the 1982 Democratic state primary ballots. See Hall v. Beals, 396 U.S. 45, 48 (1969).

Langone and Langone supporters assert that, because they sought declaratory relief as well as injunctive relief below, this Court's decisions in Hall v. Beals, supra, and Brockington v. Rhodes, 396 U.S. 41 (1969), are inapposite. (App. Br. at 11-16) However, they conveniently ignore the requirement that the issues involved must be "capable of repetition, yet evading review" to avoid being rendered moot. Moore v. Ogilvie, 394 U.S. 814, 816 (1969). (emphasis supplied). Langone's "fair notice" claim is demonstrably not "capable of repetition."

Langone and Langone supporters contend that since the "Democratic State

Committee is apparently free to enforce whatever charter provisions respecting ballot access that the state Democratic Party may enact ... the circumstances of the 1980 [sic] primary election [sic] are capable of repetition as prospective statewide candidates will be unable to divine from the statutes who has authority to impose ballot access requirements and what those requirements will be." (App. Br. at 15) The premise of this contention is misleading. This case involves a single Massachusetts Democratic Party Charter provision, the "fifteen percent rule." The Massachusetts Supreme Judicial Court did not consider or adjudicate the validity or enforceability of any other actual or hypothetical Charter provision.

Prospective Massachusetts Democratic statewide candidates, including Langone, are certainly now on notice that compliance with the "fifteen percent rule" is a necessary precondition to Democratic state primary ballot access. Consequently, Langone's "fair notice" claim, as distinguished from his substantive challenge to the "fifteen percent rule", is not "capable of repetition" and is moot.

CONCLUSION

For all of the foregoing reasons, appellee Michael J. Connolly, as he is Secretary of State of the Commonwealth of Massachusetts, moves this Court to dismiss the appeal of Langone and Langone supporters or, in the alternative, to deny the request of Langone and Langone

supporters for review by writ of certiorari.

Respectfully submitted,

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No. 82-936.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

FREDERICK C. LANGONE,
MADELINE G. SARNO, VICTOR GRILLO,
LOUIS FERRETTI, GAIL A. FASANO,
THE LANGONE FOR LIEUTENANT GOVERNOR
COMMITTEE, AND FRANCIS X. BELLOTTI,
APPELLANTS,

v.

MICHAEL J. CONNOLLY,
AS HE IS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
DEMOCRATIC STATE COMMITTEE,
SAMUEL ROTONDI, JOHN F. KERRY,
LOIS PINES, AND EVELYN MURPHY,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
COMMONWEALTH OF MASSACHUSETTS.

Appellants' Brief Opposing Motion to Dismiss of Appellee, Connolly.

THOMAS D. BURNS,
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CONSTITUTIONAL PROVISIONS

United States Constitution, amend. I . . . . . Passim.

United States Constitution, amend. XIV . . . . . Passim.

United States Constitution, art. III 14

STATUTES

28 U.S.C. §1257(2) 8, 11

28 U.S.C. §1257(3) 8, 11

Massachusetts General Laws,
c. 53, §§1 et seq., ... Passim.

STATEMENT OF FACTS

There are a number of important factual inaccuracies contained in the Motion to Dismiss of Appellee Connolly which are of significance to the issues before this Court.

At page 10, n. 8, of the Motion to Dismiss, it is stated that all factual statements contained therein are derived from the Statement of Agreed Facts. This is incorrect in the following instances:

(1) At pages 40-41 of the Motion to Dismiss, the following assertion is made:

> Although his name did not appear upon the Democratic state primary ballot, Langone was still a candidate for Lieutenant Governor. He sought the nomination of the Massachusetts Democratic Party "by means of pasters or write-ins."

> If he had received write-in votes in an amount sufficient to give him a plurality of the votes cast in the primary, he would have been the Party's nominee. Thus, the "fifteen percent rule" did not deny Langone his alleged "right to run for public office."

There is nothing in the Statement of Agreed Facts which supports in any way the assertion that Mr. Langone sought the Democratic Party nomination as a "paster or write-in candidate". In fact, Mr. Langone did not pursue his party's nomination by any means other than by seeking to have his name printed on the official state election ballot.

(2) At page 62 of the Motion to Dismiss, the following assertion of fact appears:

> The "Rules of the 1982 Massachusetts Democratic Convention" required that candidates file a statement regarding their support of the platforms and the Party Charter. Langone filed his statement with the Democratic State Committee on May 4, 1982. Langone's statement reveals that he knew that access to primary ballots would be determined by the vote of the Endorsing Convention.

The Statement of Agreed Facts again does not support the assertion made by appellee Connolly in his Motion to Dismiss. A true copy of the statement filed by Mr. Langone with the Democratic State Committee was attached to and incorporated in the Statement of Agreed Facts. That statement reveals in its first sentence that Mr. Langone

considered the Convention "non-binding".

(3) At page 63 of the Motion to Dismiss, appellee Connolly asserts the following:

> Until Langone filed his nomination papers with the State Secretary on May 26, 1982, the State Secretary did not know that Langone was a candidate.

Not only does the Statement of Agreed Facts fail to support this assertion but it directly contradicts it. Appellee Connolly's Motion to Dismiss refutes his asserted lack of knowledge at pages 61-62, where it states:

> Langone was sent a copy of an announcement released by the State Secretary on April 9, 1982 which informed Langone

> that the Governor had requested the advisory opinions of the Justices. All candidates were invited to file briefs with respect to the question of the "fifteen percent rule".

Appellee Connolly invited Mr. Langone to file a brief, as a candidate, with respect to the request for an advisory opinion on April 9, 1982.

JURISDICTION OF THIS COURT

At page 3 of the Motion to Dismiss, appellee Connolly asserts the following:

> At the ouset, it is important to realize that no party in this case has ever challenged the constitutionality of any statute. Thus, the jurisdictional bases invoked by appellants are inapposite.

In fact, there were two distinct challenges to the constitutionality of the Massachusetts statutory scheme for obtain-

ing access to the state primary election ballot. M.G.L.c.53, §§1 et seq. These challenges arose from the doubt cast upon the statutory scheme for obtaining ballot access by the Opinion of the Justices, 385 Mass. 1201, 434 N.E. 2d 960 (1982).

In their Opinion, supra, 385 Mass. at 1204-1208, 434 N.E. 2d at 962-964, the Justices opined that a bill amending M.G.L.c.53, §44, by providing that a candidate's name would appear on the state primary election ballot upon fulfilling the existing signature requirements notwithstanding any political party rule to the contrary would unconstitutionally intrude upon the First Amendment rights of political parties. The Justices specifically declined to determine whether the state Democratic Party's "fifteen percent rule" superceded the existing statutory requirements for ballot access.

Opinion of the Justices, supra, 385 Mass. at 1202-1203, 434 N.E. 2d at 961.

In their Complaint, appellants alleged that the only legitimate requirements for ballot access were those delineated in M.G.L.c.53, §§1 et seq., and that the existing statutes were silent as to any additional requirements imposed by political party rules. Among the questions presented to the Supreme Judicial Court by both the appellants and the appellee Democratic State Committee were whether enforcement of the provisions of M.G.L.c.53, §§1 et seq., required that Langone's name be placed on the state primary election ballot notwithstanding his failure to meet the state Democratic Party's "fifteen percent requirement" and whether enforcement of the provisions of M.G.L.c.53, §§1 et seq., would infringe or abridge the constitutional rights of

the Democratic Party and its members. Thus, in this respect, the constitutionality of M.G.L.c.53, §§1 et seq., was an issue before the Supreme Judicial Court.

As yet, the opinion of the Supreme Judicial Court has not been issued. The Supreme Judicial Court may uphold the constitutionality of the Massachusetts statutory scheme for obtaining access to primary election ballots in which event jurisdiction of this Court would be conferred by 28 U.S.C. §1257(2). Alternatively, the Supreme Judicial Court may hold that the Massachusetts statutory scheme fails to protect the associational rights of the state Democratic Party and its members and is therefore repugnant to the Constitution of the United States in which event jurisdiction of this Court would be conferred by 28 U.S.C. §1257(3).

The second challenge to the constitutional validity of M.G.L.c.53, §§1 et seq., arises from the appellants' allegation in their Complaint that appellee Connolly deprived them of their First Amendment rights without adequate notice and due process of law, while acting under color of state law. However, because the statutory scheme for ballot access is silent as to the additional requirements for ballot access which may be imposed by political party rules, it is appellee Connolly's contention that the statutes permit him and the appellee Democratic State Committee the authority to have excluded Langone's name from the primary election ballot. In support of his position, Connolly relied upon the Opinion of the Justices, supra, 385 Mass at 1201, 434 N.E. 2d at 960. The appellants therefore presented to the

Supreme Judicial Court the questions of whether appellee Connolly acted within his statutory authority by refusing Langone ballot access, whether the appellee Democratic State Committee may regulate ballot access, and if so, whether Secretary Connolly's and the Democratic State Committee's actions consistent with state law were nonetheless unconstitutional in that appellants were deprived of their First Amendment rights without fair notice of ballot access requirements. Fairly included within the appellants' questions is whether M.G.L.c.53, §§1 et seq., is facially invalid as it fails to provide fair notice of appellee Connolly's and the appellee Democratic State Committee's authority to impose ballot access requirements contained in political party rules or whether the statute was invalidly

applied to the appellants. In this respect, then, the constitutional validity of the state statutory scheme for ballot access was an issue before the Supreme Judicial Court. Again, because the opinion of the Supreme Judicial Court has not yet been issued, it is not possible for the appellants to specify at this time whether the jurisdiction of this Court is found in 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3).

ARGUMENT

I. THIS CASE IS A PRESENT, LIVE CONTROVERSY CAPABLE OF REPETITION YET EVADING REVIEW

Appellee Connolly contends in his Motion to Dismiss, at page 60, n. 34, that the appellants' claim that they were denied fair notice of the ballot access requirements is moot. This contention is

grounded in appellee Connolly's assertion that it is now impossible to give appellants the relief they sought from the Massachusetts courts. In support of his position, appellee Connolly relies upon his reading of this Court's rulings in Hall v. Beals, 396 U.S. 45, 90 S. Ct. 200 (1969), and Brockington v. Rhodes, 396 U.S. 41, 90 S. Ct. 206 (1969). Both the assertion that relief is now impossible and the appellee's reliance upon Brockington v. Rhodes, supra, and Hall v. Beals, supra, are in error.

In Brockington, supra, 396 U.S. at 43-44, 90 S. Ct. at 207-208, appellant petitioned in the state courts only for a writ of mandamus with respect to a particular election which by then was past. In Brockington, supra, appellant did not seek declaratory relief having effects beyond the particular election in issue,

did not seek redress for the violation of the voters' rights and did not seek other just and proper redress for the alleged constitutional violations and injuries. In view of the limited nature of the relief sought, this Court ruled the case moot. Id. Similarly, this Court disposed of Hall v. Beals, supra, 396 U.S. at 47-48, 90 S. Ct. at 201. In Hall, supra, the appellants sought only a writ of mandamus, an order in the nature of mandamus and an injunction with respect to an election then past. Again, appellants did not seek declaratory relief, which would have affected future elections, nor did they seek other appropriate redress for the alleged injury to their constitutional rights.

Here, the appellants requested declaratory relief in their Complaint in addition to including claims of injury to

their rights as voters and seeking whatever further redress for their injuries was deemed just and proper by the Massachusetts courts. This case is therefore a present, live controversy as required by Article III of the Constitution of the United States. Moore v. Oglivie, 394 U.S. 814, 815-816, 89 S. Ct. 1493, 1494 (1969).

Another distinction between this case and Hall v. Beals, supra, 396 U.S. at 48, 90 S. Ct. at 201, reveals the liveness of the controversy here. In Hall, supra, amendatory action by the Colorado Legislature operated to render the case moot. Here, M.G.L.c. 53, §§1 et seq., has not been amended and remains silent as to any ballot access requirements which may be imposed by political party rules, and the appellee Democratic State Committee continues to give effect

to the "fifteen percent rule" contained in the Charter of the state Democratic Party. As long as these conditions exist, the Democratic State Committee is apparently free to enforce whatever charter provisions respecting ballot access that the state Democratic Party may enact and the circumstances of the 1980 primary election are capable of repetition as prospective statewide candidates will be unable to divine from the statutes who has authority to impose ballot access requirements and what those requirements will be. As did the appellants in Moore v. Oglivie, supra, 394 U.S. at 815-816, 89 S. Ct. at 1494, appellants here seek declaratory relief with respect to a statutory and a political party scheme for the nomination of candidates to statewide office which remains and controls future elections.

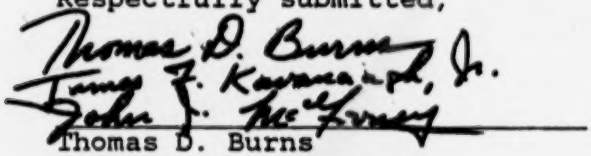
The problem is therefore one capable of repetition yet evading review and the need for its resolution reflects a continuing controversy, as challengers to elections procedures are frequently unable to obtain judicial review until after the elections in issue have been concluded. Moore v. Oglivie, supra, 394 U.S. at 816, 89 S. Ct. at 1494. Democratic Party of United States v. LaFollette, 450 U.S. 107, 115, n. 13, 101 S. Ct. 1010, 1015, n. 13 (1981); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 300-301, n. 12, 99 S. Ct. 2301, 2310, n. 12 (1979); Storer v. Brown, 415 U.S. 724, 737, n. 8, 94 S. Ct. 1274, 1282, n. 8 (1974).

CONCLUSION

For the reasons stated above, the

appellants respectfully request that this Court deny the Motion to Dismiss.

Respectfully submitted,



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No. 82-936.

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OCTOBER TERM, 1982.

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SAMUEL ROTONDI, JOHN F. KERRY,
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United States Constitution, amend. I . . . . . Passim.

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M.G.L.c. 53, §§ et seq., ... Passim.

JURISDICTION OF THIS COURT

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts in Frederick C. Langone, et al.[1] v. Secretary of the Commonwealth, et al.[2], No. S-2889, was issued by that Court on February 16, 1983. Copies of the opinion were filed separately with the Clerk of the this Court on February 17, 1983. This Supplemental Brief Opposing the Motion to Dismiss of Appellee Connolly is

---

1. Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, The Langone for Lieutenant Governor Committee, Joel M. Pressman, and plaintiff-intervenor, Francis X. Bellotti, as Attorney General of the Commonwealth.

2. The Democratic State Committee, Evelyn F. Murphy, Samuel Rotondi, Louis R. Nickinello, John F. Kerry, and Lois E. Pines.

filed calling attention to matters contained in the opinion of the Supreme Judicial Court not available at the time appellants filed their Brief Opposing the Motion to Dismiss. Sup. Ct. R. 16.6. (Hereinafter, the Court's opinion will be cited as Opinion.)

The Supreme Judicial Court has upheld the constitutionality of M.G.L.c. 53, §§1 et. seq., the Massachusetts statutory scheme for obtaining access to state primary election ballots. However, it is evident that in adjudicating the crucial questions of whether enforcement of the provisions of M.G.L.c. 53, §§1 et seq., would infringe or abridge the constitutional rights of the state Democratic Party and whether the state Democratic Party may regulate ballot access restricting appellants in the exercise of their First Amendment

rights of expression and association,[3] the Supreme Judical Court placed principal reliance upon decisions of this Court interpreting the Federal Constitution. After noting that M.G.L.c. 53, §44, provides "nomination of candidates for nomination at state primaries shall be by nomination papers", and that M.G.L.c. 53, §2, provides "[n]o candidates shall be nominated ... in any other manner than is provided in this chapter or chapter fifty-two"[4], the Supreme

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3. Contrary to the assertions of appellee Connolly in his Supplemental Brief at pages 7-12, these questions and others specified in Appellants' Brief Opposing the Motion to Dismiss of Appellee Connolly, at pages 7-11, were presented to the Supreme Judicial Court by the briefs filed with that Court both on behalf of the appellants and the appellee Democratic State Committee.

4. At page 6, n. 4, of its Opinion, the Court ruled that M.G.L.c. 52 is irrelevant to the constitutional questions presented.

Judicial Court stated that M.G.L.c. 53 "may reasonably be construed in two ways: as providing the only requirements for primary ballot access, excluding all others, or ... as providing minimum requirements for primary ballot access but permitting imposition by the party of additional requirements ..."[5] Opinion, at 6. Relying singularly and at length on its analysis of this Court's decision in Democratic Party of the United States v. LaFollette, 450 U.S. 107, 101 S. Ct. 1010 (1981), the Supreme Judicial Court ruled that the first of these statutory constructions would render M.G.L.c. 53

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5. In spite of its view that either interpretation is reasonable, the Court concluded with respect to appellants' claim for lack of fair notice that "[a]ny assumption that M.G.L.c. 53 provided the exclusive requirements for primary ballot access was unwarranted." Opinion, at 19, n. 6.

unconstitutional as substantially interfering with the funadamental rights of association guaranteed to the state Democratic Party. Opinion, at 9-12. Therefore, the Supreme Judicial Court rejected a construction of M.G.L.c. 53 that would render ineffective party rules governing ballot access. Opinion, at 12. The Supreme Judicial Court adopted the second construction, citing its "duty to construe statutes so as to avoid ... constitutional difficulties, if reasonable principles of interpretation permit it."

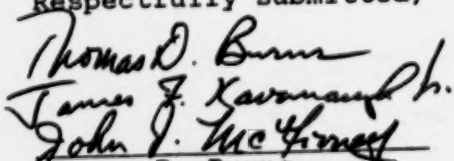
The opinion of the Supreme Judicial Court cited this Court's First Amendment cases as controlling. The decision rested solely on federal grounds. If the Supreme Judicial Court held as it did because it felt under compulsion of federal law as enunciated by this Court, it should be relieved of that compulsion

for if the Supreme Judicial Court erred in its understanding of federal law, this Court has jurisdiction and should decide the federal issues. Zachini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566568, 97 S. Ct. 2849, 2852-2854 (1977).

CONCLUSION

For the reasons stated above, appellants respectfully request that the Motion to Dismiss of appellee Connolly be denied.

Respectfully submitted,



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No. 82-936.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

FREDERICK C. LANGONE,
MADELINE G. SARNO, VICTOR GRILLO,
LOUIS FERRETTI, GAIL A. FASANO,
THE LANGONE FOR LIEUTENANT GOVERNOR
COMMITTEE, AND FRANCIS X. BELLOTTI,
APPELLANTS,

v.

MICHAEL J. CONNOLLY,
AS HE IS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
DEMOCRATIC STATE COMMITTEE,
SAMUEL ROTONDI, JOHN F. KERRY,
LOIS PINES, AND EVELYN MURPHY,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
COMMONWEALTH OF MASSACHUSETTS.

Appellants' Brief Opposing Motion to Dismiss of Appellee, Democratic State Committee.

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STATEMENT OF FACTS

The appellee Democratic State Committee has brought certain facts to this Court's attention in its Motion to Dismis. The appellants present here a more complete statement of facts relevant to the appellee's motion and to the appellants' claim that they were deprived of adequate notice of what the ballot access requirements were.

The facts reveal that from the outset of its consideration of a "percent rule" for gaining ballot access, the State Democratic Party was doubtful that such a rule could be enforced absent enabling legislation. In view of this uncertainty, it is understandable that appellants were left to wonder what ballot access requirements would be imposed in the 1982 state primary election.

In February of 1977, then-Chairman of the Democratic State Committee Charles F. Flaherty appointed a Charter Commission to draft a proposed charter for the Democratic Party. That Commission had before it, among other recommendations, the suggestion that the Democratic Party should adopt a preprimary endorsing convention. Such a convention, it was suggested, should incorporate a provision by which only candidates who received 20 percent of the convention vote could challenge the convention endorsee in a primary. The system envisioned by the Commission, and by those recommending it, would be modeled after those of Connecticut and New Mexico. The Commission was aware, however, that Connecticut provided for nomination by convention and that Connecticut's election laws mandated no primary but pro-

vided for one only in the event of a candidate challenging the party endorsee consistent with a statutory 20 percent rule. Conn. Gen. Stats., §9-383-400. Connecticut statutes required that an endorsing convention be held and regulated said convention in detail. Id. The Commission also knew that New Mexico statutes provided for preprimary conventions and for a 20 percent requirement in addition to a mandated primary election. New Mexico Stats., c. 1, §§8-38, 8-39.

Recognizing that Massachusetts mandated a state primary, the Commission drafted Article Six, Section III of its charter proposal to provide that those candidates receiving 20 percent or more of the endorsing convention's vote may challenge the convention's endorsee in the primary. Proposed Article Six,

Section III was therefore a hybrid of certain features from Connecticut's and New Mexico's statutory nomination procedures.

The Commission presumably recognized that legislative changes were necessary in order that its proposed "20 percent rule" be implemented. Although the appellee Democratic State Committee is correct in stating at page 34 of its Motion to Dismiss that M.G.L. c. 52, §10, gives it the right to "make rules and regulations, consistent with law, for calling conventions", it is wholly inconsistent with M.G.L. c. 53, §§1 et seq., to assume that M.G.L. c. 52, §10, confers any right on the appellee to set and enforce ballot access requirements not provided by statute. In fact, M.G.L. c. 53, §§1 et seq., exclusively provides what the ballot access requirements shall

be for state primary elections.[1] Appellants properly relied upon M.G.L. c. 53, §§1 et seq., when seeking ballot access for candidate Langone.

M.G.L. c. 53, §2, provides that "candidates of political parties for all elective offices, except presidential elector, shall be nominated ... in primaries or caucuses." The statute con-

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1. It is not possible that the Supreme Judicial Court disposed of the appellants' federal claims on independent and adequate state grounds. The Court may have held as a matter of state statutory construction that M.G.L. c. 53, §§1 et seq., does not intrude upon the rights secured to the state Democratic Party under the Massachusetts Constitution but such a holding would not obviate the necessity of determining the constitutional validity of M.G.L. c. 53, §§1 et seq., or of its application in this instance where appellants and appellees alike have raised federal questions concerning the rights secured to each by the First Amendment and Fourteenth Amendment to the United States Constitution.

tinues and differentiates between candidates of political parties and those of other groups providing that, as to nominations of political parties, "[a]ll nominations and elections in primaries and caucuses shall be by direct plurality vote." Id.

The Legislature, pursuant to its power to supervise elections, has also specified the method by which candidates may secure a position on the primary ballot. M.G.L. c. 53, §44, provides that the "nomination of candidates for nomination at state primaries shall be by nomination papers." In order to be placed upon a primary ballot for the office of Lieutenant Governor, a candidate must file nomination papers signed by at least ten thousand voters. Id. A prospective candidate must also comply with the signature requirements of M.G.L.

c. 53, §46, which requires that the signatures on nomination papers be certified by local registrars of voters; M.G.L. c. 53, §45, which requires that the candidate's written acceptance of the nomination appear on his nomination papers; and M.G.L. c. 53, §48, which requires that the candidate be certified by his local registrar of voters as having been enrolled as a member of the party whose nomination he seeks on or before the ninetieth day prior to the last day provided for filing nomination papers with the State Secretary and that said certificate be filed with the State Secretary on or before the date of filing said papers. This is the complete method, and only method, provided for the nomination of political party candidates; as M.G.L. c. 53, §2, specifically states: "[n]o candidates shall be nominated in

any other manner than is provided in this chapter or chapter fifty-two." Relying upon these statutory provisions, appellants fulfilled all requirements and expected the name of appellant Langone to appear on the ballot.

The charter was proposed as a first credible step in the direction of lobbying for legislative action.

A convention of the Democratic Party was held on May 19, 1979 for the purpose of adopting a charter for the party. That convention was adjourned prior to its consideration of proposed Article Six, Section III and the "20 percent rule".

The Charter Convention reconvened on November 17, 1979 for the purpose of completing action on the remaining articles of the proposed charter. Precisely what was discussed, if anything at

all, on the relation of the charter to state law cannot be determined as the tapes of the November 17, 1979 session no longer exist. The minutes of the session, however, do reflect that Article Six, Section III was voted upon and adopted with the amendment that the 20 percent figure be reduced to 15 percent.

On February 1, 1981, the Democratic State Committee mailed to the chairpersons of various Democratic Town and Ward Committees of Massachusetts a copy of the charter as adopted in 1979 and a letter from its chariman, Chester G. Atkins. This letter was mailed in anticipation of an upcoming April 11, 1981 platform convention and Chairman Atkins emphatically stated therein:

> "Legislation must be passed in order to implement the following portions of the Charter ... Article Six, Section III "Endorsing Conven-

tion" --- entire section ... The legislation necessary to implement these points has been filed and will be considered during the 1981 session of the Massachusetts Legislature." (Emphasis added.)

This same letter was mailed on a second occasion prior to April 11, 1981. In this second mailing, a copy of the Charter adopted in 1979 was enclosed.

On April 11, 1981, the Democratic Party met in convention for the purpose of adopting a platform for the party. Following the convention, the Democratic State Committee published a document entitled "The Charter and Platform of the Democratic Party of the Commonwealth of Massachusetts." On July 27, 1981, this document was mailed by the Democratic State Committee and contained on its Table of Contents page the follwoing heading: "CHARTER OF THE DEMOCRATIC PARTY OF THE COMMONWEALTH OF MASSACHUSETTS*".

At the bottom of the page, the following note appeared: "*NOTE: Several sections of the Charter have yet to go into effect due to legislation pending in the Massachusetts General Court."

Contrary to the assertion of the appellee Democratic State Committee at page 13 of its Motion to Dismiss, the state party leadership was not uncertain about the legal effect of the "15 percent rule" because of legislation pending in the Massachusetts General Court during 1981. Instead, the state party leadership had sponsored legislation seeking to give legal effect to the "15 percent rule" because of its uncertainty.

In 1981, Representative Charles F. Flaherty, a member of the Democratic State Committee and its Chairman at the time of the Charter Commission's appointment, filed H. 3566, a bill seeking to

implement the provisions of Article Six, Section III of the Democratic Party Charter. Senator Gerard D'Amico, a Democratic Party member of the Massachusetts Senate, filed S. 390, of 1981, seeking to implement Article Six, Section III. No report of these bills has ever been made and no legislation implementing Article Six, Section III has ever been enacted. It is evident that for many years preceeding its 1982 Convention, the Democratic Party believed, as did appellant Langone, that the "15 percent rule" had no effect absent the passage of enabling legislation.

Nowhere in the Statement of Agreed Facts is there support for the apparent assertion of the appellee Democratic State Committee at pages 13-14 of its Motion to Dismiss that in light of this Court's decision in Democratic Party

of the United States v. LaFollette, 450 U.S. 107, 101 S. Ct. 1010 (1981), the Democratic State Committee made a group determination prior to May 25, 1982, that the "15 percent rule" could be implemented immediately. Instead, the Statement of Agreed Facts established only that if he were allowed to testify, Chester G. Atkins would testify that at a meeting of the Democratic State Committee on November 7, 1981, he stated his opinion that the case of Democratic Party of the United States v. LaFollette, supra, could make the "15 percent rule" effective without legislation. Similarly, the parties have agreed that if allowed, appellant Langone would testify that he was not notified of the November 7, 1981, meeting and was not informed of any opinion expressed by Mr. Atkins at said meeting.

On May 21-22, 1982, a convention of the state Democratic Party was held for the purpose of endorsing candidates for statewide office.[2]

On May 25, 1982, Chester G. Atkins wrote appellee Secretary Connolly, apparently on behalf of the appellee Democratic State Committee, and informed Secretary Connolly that pursuant to Article Six, Section III of the party's

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2. On May 21, 1982, an amendment was presented to the Endorsing Convention to delete Article Six, Section III of the party Charter. After debate it was defeated. Immediately thereafter, a second amendment, which would postpone the effective date of Article Six, Section III to January 1, 1983, was presented to the Endorsing Convention and defeated. Neither of these proposed amendments was specifically addressed to the "15 percent rule" but instead would have abolished the convention in the first instance or in the case of the second amendment, postponed the holding of the first endorsing convention until after January 1, 1983.

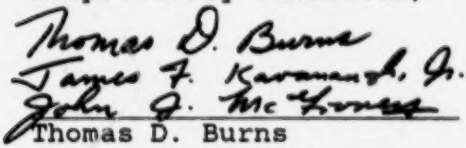
charter, four candidates for the nomination to Lieutenant Governor had received fifteen percent of the convention vote and were therefore eligible to run in the state primary election. Appellant Langone's name was not listed among the four. On May 26, 1982, appellant Langone received from the Office of the Massachusetts Secretary of State a letter signed by Marcia Molay, Director of Elections. Said letter stated that because of the May 25, 1982, letter from Atkins to Secretary Connolly, Secretary Connolly had decided not to place Langone's name on the Democratic state primary election ballot.

CONCLUSION

For the reasons stated above, the appellants respectfully request that the

Motion to Dismiss be denied.

Respectfully submitted,



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A. MAJOR PARTIES

§ 9-383. Time and place of convention

The time and place of meeting of a state or district convention shall be fixed by the state central committee or other authority of the party holding such convention, in accordance with the rules of such party; provided each such convention held to endorse candidates for state or district office to be voted upon at a state election shall be convened not earlier than the sixty-first day and closed not later than the forty-third day preceding the day of the primary for such office.

§ 9-384. Calls for conventions

Each convention shall originate by call of the chairman of the state central committee or other authority of the party holding such convention, in accordance with the rules of such party, which call shall be published, at least ninety days before such convention is to be held, in a newspaper or newspapers published and circulating within the state or within the district for which such convention is to be held, as the case may be.

§ 9-384a. Repealed. (1979, P.A. 79-363, § 37.)

The repealed section, which provided for calls for 1974 party conventions, was added by 1974, P.A. 74-25, § 11.

§ 9-385. Roll-call vote or polling by delegation at convention

Whenever one-fifth or more of the accredited delegates to, and present and voting at, any state or district convention, called for the purpose of choosing candidates for nomination for any elective office, upon motion, vote in favor of a roll call upon any matter or motion pending before such convention, or whenever a vote is to be taken on a party endorsement as between two or more candidates for nomination to any state or district office at any such convention, the clerk or secretary of such convention shall call such roll and shall keep a true record, in writing, of the vote of each delegate entitled to vote and voting at such convention or shall poll such convention by delegations if this procedure has been chosen by the convention pursuant to section 9-385a, and shall, at the conclusion of such roll call or call by delegations as the case may be, announce the result of such vote. Such clerk or secretary shall file such record at the headquarters of the state central committee, where it shall be preserved for a period of six months after the adjournment of such convention, and such record shall be open to public inspection at all reasonable times.

§ 9-385a. Voting by delegation at state convention

The delegates to the state convention of each party elected from each town shall select a chairman of such delegation and file the name and address of such chairman with the secretary of the state central committee of such party prior to the opening of such convention. Whenever one-fifth or more of the accredited delegates to, and present and voting at, any such state convention called for the purpose of choosing candidates for nomination for any elective office, upon motion, vote that a roll call vote, under section

9–385, upon any matter or motion pending before such convention, or on a party endorsement as between two or more candidates for nomination to any state office at any such convention, be taken by town delegation, the individual delegates shall be polled by the chairman of each town delegation whose designation is recorded as provided herein and their votes cast by totals by such chairman on the roll call. A list of the names and the vote of each delegate shall be filed by the said chairman of each town delegation with the clerk or secretary of the convention prior to the announcement of the result of such roll call vote and shall be preserved with the record of the vote as provided in section 9-385. A duplicate copy of such list shall be filed with the secretary of the state not later than forty-eight hours after the close of such convention. Upon announcement by the chairman of the vote of a town delegation, any delegate from such town may question or challenge such announcement, and thereupon, the vote of such town delegation shall be individually taken by the clerk or the secretary of such convention calling the roll, and each delegate shall announce his own vote. The provisions of this law shall not apply to district delegates, if any, and district delegates shall continue to vote individually on any roll call.

§ 9–386. Tie vote on endorsement

If a vote taken under sections 9–382 to 9–450, inclusive, on the selection of any party-endorsed candidate for state or district office results in a tie, such tie vote shall be dissolved in the manner prescribed in the applicable state or district rules of the party selecting such candidate; provided, if said party rules are silent or permit the tie vote to remain, a tie may be declared by the chairman or the presiding officer and there shall be no party endorsement. In such case of no party endorsement, statements may be filed under section 9–400, by or on behalf of any qualified person whose name appears upon the last-completed enrolment list of such party and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the proposed endorsement of a candidate for such state or district office. In such event, if within the time specified in section 9–400, a candidacy for nomination to such state or district office is filed in conformity with the provisions of sections 9–400 to 9–414, inclusive, by not more than one person, no primary shall be held by such party for such office and the person filing such candidacy shall be deemed to have been lawfully chosen as the nominee of such party for such office; but if such candidacies are so filed by two or more persons, a primary shall be held as provided in section 9–415.

§ 9–388. [Filing of certificate of endorsement]

Whenever a convention of a political party is held for the endorsement of candidates for nomination to state or district office, each candidate endorsed at such convention shall file with the secretary of the state a certificate, signed by him, stating, that he was endorsed by such convention, his name and full residence address and the title and district, if applicable, of the office for which he was endorsed. Such certificate shall be attested by either (1) the chairman or presiding officer or (2) the secretary of such convention and shall be received by the secretary of the state not later than four o'clock p. m. on the fourteenth day after the close of such convention or if such fourteenth day is a Saturday, Sunday or legal holiday, not later than four o'clock p. m. on the next succeeding business day. If a certificate of a party's endorsement for a particular state or district office is not received

by the secretary of the state by such time, such party, for purposes of section 9-416 and section 2 of public act 81-447 shall be deemed to have made no endorsement of any candidate for such office. If applicable, the chairman of a party's state convention shall, forthwith upon the close of such convention, file with the secretary of the state the names and full residence addresses of persons selected by such convention as the nominees of such party for electors of president and vice president of the United States in accordance with the provisions of section 9-175.

§ 9-390. Selection of party-endorsed candidates

(a) Except as provided in subsection (g) of this section, party-endorsed candidates of any party in any municipality for municipal office shall be selected, in accordance with the rules of such party, by: (1) The enrolled members of such party in such municipality in caucus, (2) delegates to a convention chosen in accordance with such rules by such enrolled members or (3) the town committee of such party. The town chairman or his designee shall give notice in a newspaper having a general circulation in the town of the date, time, location and purpose of a caucus held pursuant to subdivision (1) of this subsection. Such notice shall be given not less than five days prior to the date set for the caucus; provided, if the rules of the party in any municipality require earlier notice, such party rules shall prevail.

(b) Except as provided in subsection (g) of this section, party-endorsed candidates of any party in any municipality for delegates to conventions shall be selected, in accordance with the rules of such party, by the method prescribed in either subdivision (1) or (3) of subsection (a) of this section.

(c) Except as provided in subsection (g) of this section, party-endorsed candidates of any party in any municipality for town committee members shall be selected, in accordance with the rules of such party, by the method prescribed in subdivision (1) of subsection (a) of this section.

(d) The selection of party-endorsed candidates in the manner provided in subsection (a), (b) or (c) of this section shall be made and certified to the clerk of the municipality within the time specified in section 9-391. Such certification shall contain the names and street addresses of the persons so endorsed, the title of the office or the position as committee member or delegate and the name or number of the political subdivision or district, if any, for which each such person is endorsed. In the case of endorsement of candidates for delegate to a convention, such certification may also contain the last name of a candidate, if any, selected by the endorsing authority for placement on the ballot label pursuant to section 9-437.

(e) In the endorsement of any person for an office or a position as delegate or committee member, in the manner provided in subsection (a), (b) or (c) of this section, for whom only the electors of a political subdivision of such municipality or of a senatorial district or assembly district located in such municipality may vote, only the enrolled party members, delegates or town committee members, as the case may be, from such political subdivision or district may participate, except that, in a municipality in which the town committee is elected at large and is the endorsing authority, such endorsement shall be made by the town committee as a whole and except that, whenever no member of the endorsing authority resides in such political subdivision or district from which the endorsement is to be made, then such endorsing authority as a whole shall endorse.

(f) Candidates endorsed in the manner provided in subsection (a), (b) or (c) of this section shall run in the primary of such party as party-endorsed candidates, except as provided in section 9-417.

(g) Any party in any municipality may by its rules provide that no selection be made of party-endorsed candidates for municipal office, town committee members or delegates to conventions and that the nominees of such party for such municipal office, town committee members or delegates to conventions of such party be chosen at direct primaries in accordance with the provisions of sections 9–405 to 9–407, inclusive, and sections 9–409 to 9–412, inclusive, except as provided in sections 9–418, 9–419 and 9–420.

(h) This section shall not apply to district delegates to conventions.

§ 9–390a. Repealed. (1978, P.A. 78–153, § 31, eff. Jan. 1, 1979.)

The repealed section, which related to election of town committee members in 1972, was derived from 1972, P.A. 3, § 1; 1972, P.A. 72–220, § 4.

§ 9–391. [Endorsements; time for and certification]

(a) Each endorsement of a candidate to run in a primary for the nomination of candidates for municipal office or for the election of town committee members or delegates to conventions shall be made under the provisions of section 9–390 not earlier than the forty-second day nor later than the fortieth day preceding the day of such primary and except as provided in subsection (b) of this section shall be certified to the clerk of the municipality by the chairman or presiding officer and the secretary of the town committee, caucus or convention, as the case may be, not later than the thirty-ninth day preceding the day of such primary except that when such thirty-ninth day is a Saturday, Sunday or legal holiday, such delivery shall be made not later than the next succeeding business day.

(b) In the case of such an endorsement for the municipal office of state senator or state representative, the candidate so endorsed shall file with the town clerk a certificate, signed by him, stating that he was so endorsed, his name and full residence address, and the title and district of the office for which he was endorsed. Such certificate shall be attested by either (1) the chairman or presiding officer, or (2) the secretary of the town committee, caucus or convention which made such endorsement, and shall be received by the town clerk not later than four o'clock p. m. on the fourteenth day after the close of such town committee meeting, caucus or convention. If such a certificate of a party's endorsement for the municipal office of state senator or state representative in a particular senatorial or assembly district is not received by the town clerk by such time, such party, for purposes of sections 9–417 and 9–418, shall be deemed to have neither made nor certified any endorsement of any candidate for such office in such district.

§ 9–392. Selection of town committees

A town committee shall be selected by each party in each town, in accordance with the provisions of sections 9–382 to 9–450, inclusive, not later than July 1, 1956, and thereafter at intervals not greater than twenty-six months. The terms of town committee members shall start on the first Monday following the date for the primary, unless otherwise provided in the party rules, except that the terms of all members shall begin and end on the same day; provided, when a town committee increases its membership as provided in section 9–393, the party rules shall specify

the day upon which the term of all the new positions created by such increase shall begin. (1963, P.A. 17, § 20.)

§ 9–393. Selection of town committee members and delegates

All town committee members and delegates to conventions shall be chosen as provided in sections 9–382 to 9–450, inclusive. Vacancies in town committees, arising from any cause including failure to elect, shall be filled in such manner as the rules of the party prescribe. The chairman of a town committee may be chosen by the town committee from within or without the membership of the town committee as the rules of the party prescribe. Any town committee may, by party rules adopted in accordance with section 9–375 and filed under section 9–374, increase its membership and fill new positions created by such increase in the manner prescribed in the applicable party rules. The rules of a party may provide methods for the filling of vacancies in delegations to conventions, which methods may include prescribing that each delegate elected in conformity with the provisions of sections 9–382 to 9–450, inclusive, may designate an alternate delegate or a proxy to act for him in his absence. (1963, P.A. 17, § 21; 1963, P.A. 130.)

§ 9–394. District delegates

If the state rules of a party provide that certain delegates to state or district conventions be chosen from districts of two or more towns or of parts of two towns, or of a town or towns and a part or parts of another town or other towns, the party-endorsed candidates for election as such district delegates shall be selected in such manner as is prescribed in such rules; provided such selection shall be made within the time specified in section 9–391; and provided, upon such selection, the information required in section 9–390 shall forthwith be certified, in such manner as is prescribed in such rules, to the clerk of each municipality in such district, and such certification shall be deemed the certification of the party in such municipality.

§ 9–394a. Senatorial and assembly district convention delegates

Any major party in any part of a town which is a component part of a senatorial or assembly district composed of parts of two towns or of a town or towns and a part or parts of another town or other towns may elect delegates to a senatorial or assembly district convention in such district as provided in this title and its party rules and may participate in the selection of a candidate for state senator or state representative in such district in the manner provided for a town which is a component part of a senatorial district in a district composed of two or more towns under this title. The name of each member of an

opposition slate of delegates from such part of a town and the name of each signer of a primary petition therefor under section 9–407 shall appear on the last-completed enrolment list of such party for such part of a town. In addition to other requirements prescribed by law, the name of a person on whose behalf a primary petition is filed for nomination to the office of state senator or state representative for such district and the names of the signers of any such petition shall appear on the last-completed enrolment list of such party for such part of a town or for any other town which is a component part of such district.

§ 9–395. Publication of information concerning municipal primaries

Forthwith upon the certification provided in sections 9–390 and 9–391, the clerk of the municipality shall publish, in a newspaper having a general circulation in such municipality, the fact of such certification and that a list of the persons endorsed as candidates is on file in his office and copies thereof are available for public distribution. If, with respect to any office or position to be filled, the clerk of the municipality has failed to receive the certification of the name of any person as a party-endorsed candidate within the time limited in section 9–391, such fact shall be published by the clerk of the municipality. Together with such information, the clerk shall publish a notice that a primary will be held for the nomination by such political party of a candidate for the offices to be filled or for the election of members of the town committee or delegates to a convention, as the case may be, if a candidacy is filed in accordance with the provisions of sections 9–382 to 9–450, inclusive. Such notice shall specify the final date for the filing of such candidacy and the date of the primary, shall state where forms for petitions may be obtained and shall generally indicate the method of procedure in the filing of such candidacy. The secretary of the state shall prescribe the form of such notice.

§ 9–396. Ballot vote at caucus; eligibility to vote

At any caucus of the enrolled members of any party in any municipality or in any voting district of any municipality, the chairman of such caucus shall, upon the receipt of a written motion from any person lawfully participating in such caucus calling for a vote by ballot upon such matter as such motion designates, submit such motion to a rising vote; and, if fifteen electors present and legally entitled to participate in such caucus vote in favor of such motion, the vote on the matter specified in such mo-

tion shall be by ballot. The presiding officer shall thereupon appoint two tellers; and, upon the written application of fifteen electors legally entitled to participate in such caucus, he shall appoint a teller from the persons whose names appear on such application. Before any ballot is deposited, the name of the elector offering to vote shall be given to the clerk or secretary of such caucus, and such name shall be checked on the enrolment list of such party. No person shall vote or participate or attempt to vote or participate in any caucus of a party in any voting district unless he is enrolled on the last-completed enrolment list of such party in such voting district; provided, if the party rules of such party provide for a joint caucus for two or more voting districts of a municipality, a person may vote in such joint caucus if the voting district in which he is enrolled is participating in such joint caucus. Any person who violates any provision of this section shall be fined not more than two hundred dollars or imprisoned not more than thirty days or both. (1963, P.A. 17, § 24.)

§ 9–397. Tie vote on endorsement

If a vote taken under sections 9–382 to 9–450, inclusive, on the selection of any party-endorsed candidate for municipal office or for delegate or town committee member results in a tie, such tie vote shall be dissolved in the manner prescribed in the applicable rules of the party selecting such candidate. (1963, P.A. 17, § 25.)

§ 9–398. Repealed. (1981, P.A. 81–447, § 22, eff. Jan. 1, 1982.)

§ 9–400. Filing of candidacies; state or district office

(a) Within fourteen days following the close of the state convention, a candidacy for nomination by a political party to a state office may be filed by or on behalf of any person whose name appears upon the last-completed enrolment list of such party in any municipality within the state and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for such state office, whether or not the party-endorsed candidate for such office received a unanimous vote on the last ballot, by the filing with the secretary of the state, of a certificate, signed by such candidate and attested by either (1) the chairman or presiding officer, or (2) the secretary of the convention, that such candidate received at least twenty per cent of such votes, and that he consents to be a candidate in a primary of such party for such state office. Such certificate shall specify the candidate's name, his full residence address and the title of the office for which his candidacy is being filed. Except as provided in section 2 of public act 81-447, upon the expiration of the fourteen-day period, if one or more candidacies for such state office have been filed pursuant to the provisions of this section, the secretary of the state shall notify all town clerks in accordance with the provisions of section 9-433, that a primary for such state office shall be held in each municipality in accordance with the provisions of section 9–415.

(b) Within fourteen days following the close of the district convention, a candidacy for nomination by a political party to a district office may be filed by or on behalf of any person whose name appears upon the last-completed enrolment list of such party within any municipality or part of a municipality forming a component part of such district and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for such district office, whether or not the party-endorsed candidate for such office received a unanimous vote on the last ballot, by the filing with the secretary of the state of a certificate, signed by such candidate and attested by either (1) the chairman or presiding officer, or (2) the secretary of the convention, that such candidate received at least twenty per cent of such votes, and that he consents to be a candidate in a primary of such party for such district office. Such certificate shall specify the candidate's name, his full residence address and the title and district of the office for which his candidacy is being filed. Except as provided in section 2 of public act 81-447, upon the expiration of the fourteen-day period, if one or more candidacies for such district office have been filed pursuant to the provisions of this section, the secretary of the state shall notify all town clerks within the district, in accordance with the provisions of section 9-433, that a primary for such district office shall be held in any municipality or each part of any municipality within the district in accordance with the provisions of section 9-415.

1-8-38. Primary Election Law; designation of candidates by convention.

A. State conventions of major political parties shall make convention designations of candidates for nomination to statewide office or office of United States representative on the primary election ballot.

B. No state convention for designating candidates shall be held later than sixty days preceding the primary election and delegates to such convention shall be elected according to state party rules.

C. The state convention shall take only one ballot upon candidates for each office to be filled. Every candidate receiving twenty percent or more of the votes of the duly elected delegates to the convention for the office to be voted upon at the ensuing primary election shall be certified to the secretary of state as the convention-designated nominee for that office. Such certification shall take place at least fifty-five days prior to the primary election.

D. The certificate of designation by state convention shall state the name of the office for which each person is a candidate, his name and address and the name of the political party which the candidate represents, and shall certify that the candidate has been a member of that political party for the period of time required by the Election Code [this chapter]. The certificate of designation shall indicate the order of the vote received at the convention by candidates for each office but no convention shall declare that any one candidate has received the nomination of the state convention.

1-8-39. Primary Election Law; failure to receive convention designation; alternate method of placing name on primary election ballot.

A. Anyone who has been certified by the secretary of state as a candidate for convention designation but does not receive at least twenty percent of the delegate vote may have his name printed on the primary election ballot as a candidate for that office provided that no later than fifty days before the primary election he shall file a declaration of candidacy and nominating petitions in the form prescribed by Section 1-8-30 NMSA 1978 containing:

(1) the signatures of voters totaling not less than one percent in each of ten counties with a total of three percent statewide of the total number of votes cast in the state by that party for governor in the last preceding primary election at which the party's candidate for governor was nominated in the case of a candidate for statewide office; or

(2) the signatures of voters totaling not less than one percent in each of five counties with a total of three percent districtwide of the total number of votes cast in the district by that party for governor in the last preceding primary election at which the party's candidate for governor was nominated, in the case of a candidate for United States representative.

B. The secretary of state shall determine whether the nominating petitions and signatures conform to the provisions of Subsection E of Section 1-8-30 NMSA 1978.

C. If such determinations are answered in the affirmative, the candidate shall have his name printed on the primary election ballot as a candidate for such office provided that his name shall be printed on the ballot immediately following the names of those persons who are convention-designated candidates for that office. If there are two or more candidates who qualify under the provisions of this section to have their names printed on the ballot for any one office, their respective positions shall be determined by lot.